No. ___ (1)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

DON LEE DISTRIBUTOR, INC. (WARREN); DON LEE DISTRIBUTOR, INC. (DEARBORN); POWERS DISTRIBUTING COMPANY, INC.; EASTOWN DISTRIBUTORS, CO.; HUBERT DISTRIBUTORS, INC.; and OAK DISTRIBUTING CO.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondents.*

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038,

Intervenor.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit correctly held that an initial fraudulent concealment excuses later inaction and tolls Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), without regard to the aggrieved party's actual state of knowledge or diligence in pursuing its rights.

PARTIES TO THE PROCEEDINGS

This case arises from a judgment of the United States Court of Appeals for the Sixth Circuit denying a petition for review of an order of the National Labor Relations Board and granting the Board's cross-application for enforcement. The only parties are those identified in the caption. Petitioners are all privately held companies and have no publicly traded parent companies or subsidiaries.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS AND ORDERS BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 3

A. Background and Facts 4

1. Course of Bargaining 4
2. The Board's Decision 8
3. The Decision of Sixth Circuit 10

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Atlas Tack Corp., 226 N.L.R.B. 222 (1976), *enf'd*, 559 F.2d 1201 (1st Cir. 1967) 6, 13

Brown & Sharpe Mfg. Co., 299 N.L.R.B. 586 (1990), *remanded sub nom. District Lodge 64 v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991) (*Brown & Sharpe I*), *on remand, Brown & Sharpe Mfg. Co.*, 312 N.L.R.B. 444 (1993), *remanded sub. nom., Machinists District Lodge 64 v. NLRB*, 50 F.3d 1088 (D.C. Cir. 1995) (*Brown & Sharpe II*), *on remand, Brown & Sharpe Mfg. Co.*, 321 N.L.R.B. 924 (1996), *aff'd Int'l Ass'n of Machinists and Aerospace Workers, District Lodge 64 v. NLRB*, 130 F.3d 1083 (D.C. Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 2319 (1988) (*Brown & Sharpe III*) 14, 15, 17, 18

Chemung Contracting Corp., 291 N.L.R.B. 773 (1988) 13

Chicago Tribune Co., 304 N.L.R.B. 259 (1991) 10

Ducane Heating Corp., 273 N.L.R.B. 1389 (1985), *enf'd without opinion*, 785 F.2d 304 (4th Cir. 1986) 13

Fitzgerald v. Seamans, 533 F.2d 220 (D.C. Cir. 1977)..... 14

Gardner v. International Telegraph Employees, Local No. 9, 850 F.2d 518 (9th Cir. 1988)..... 18

Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) 14, 18

Jensen v. Snellings, 841 F.2d 600 (5th Cir. 1998) 16, 18

John Morrell & Co., 304 N.L.R.B. 896 (1991),
aff'd, United Food & Commercial Workers Union v. NLRB, 998 F.2d 7 (D.C. Cir. 1993) 16

Landry v. Airline Pilots Assoc. Int'l, 901 F.2d 404
(5th Cir.), *cert. denied*, 498 U.S. 895 (1990) .. 14, 15, 16, 18

Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862 (D.C. Cir. 1978) 10

Machinists Local Lodge No. 1424 (Bryan Manufacturing) v. NLRB, 362 U.S. 411
(1960) 12

NLRB v. O'Neill, 965 F.2d 1522 (9th Cir. 1992),
cert. denied, 509 U.S. 904 (1993) 14, 15

NLRB v. U.S. Postal Service, 8 F.3d 832
(D.C. Cir. 1993) 6

North American Rockwell Corp. v. NLRB, 389 F.2d 866
(10th Cir. 1968) 16

Taft Broadcasting Co., 163 N.L.R.B. 475 (1977) 6

Truck Drivers & Helpers Local 170 v. NLRB (Girardi Distributors), 993 F.2d 990
(1st Cir. 1993) 13, 14, 15, 16, 18

Statutes

28 U.S.C. § 1254(1) (1988) 2

29 U.S.C. § 160(b) (1988) 3

29 U.S.C. § 158(a)(1) (1988) 6

29 U.S.C. § 158(a)(5) (1988) 6

Other

Hensley and Jansonius, *The Interaction of Federal Labor and Antitrust Policies: An Analysis of the Legality of Coordinated Collective Bargaining by Employers*, 40 Southwestern L.J. 967 (1986) 4

H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, *1998*

DON LEE DISTRIBUTOR, INC., *ET AL.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondents.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038,

Intervenor.

PETITION FOR WRIT OF CERTIORARI

Petitioners, Don Lee Distributor, Inc. (Warren), Don Lee Distributor, Inc. (Dearborn), Powers Distributing Company, Inc., Eastown Distributors Company, Hubert Distributors, Inc., and Oak Distributing Company, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on June 2, 1998.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is officially reported in 145 F.3d 834 and appears herein as Appendix ("App.") A, *infra*, at pp. 1a-23a. The decision and order of the National Labor Relations Board are reported at 322 N.L.R.B. 470 and appear herein as App. A, *infra*, at pp. 24a-39a. The decision of the NLRB incorporates in full the Administrative Law Judge's ruling (App. A, *infra*, at pp. 40a-105a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1998. App. A, *infra*, at p. 2a. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on July 10, 1998 (App. B., *infra*, at pp. 106a-107a). This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b) (1988), provides:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

STATEMENT OF THE CASE

This case presents important questions regarding the scope of the "fraudulent concealment" doctrine in the context of Section 10(b) of the NLRA. The court of appeals established a new standard that permits the limitations period to be tolled without regard to the aggrieved party's actual state of knowledge or diligence in pursuing its rights. The issue is one of recurring importance in the enforcement of federal labor laws and has never been addressed by the Court. The split in the circuits warrants Court review now.

A. Background and Facts

1. Course of Bargaining

The Petitioners are six wholesale beer distributors operating in the Detroit, Michigan area, whose drivers have been represented by Local 1038 of the International Brotherhood of Teamsters (the "Union") for many years and many contracts. App. 41a-42a. In 1990, Petitioners withdrew from a multiemployer bargaining association and agreed to representation by West Coast Industrial Relations Association, Inc. ("West Coast") in bargaining for a new contract. *Id.*. Petitioners sought to coordinate their bargaining efforts in order to increase their bargaining power relative to the union.[1] App. 3a-4a. Guided by West Coast, they signed a mutual aid pact ("Pact") in January 1990. App. 44a-48a. The Pact called for sharing fees and expenses and identified 22 minimum bargaining objectives. App. 45a-48a. In addition, it provided that the objectives could be changed by majority vote, and specified that any distributor which breached the agreement, negotiated directly with the Union, or settled on terms in excess of the stated objectives would be liable for a penalty fee to each of the other distributors.

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[1] In multiemployer bargaining, two or more employers negotiate a single contract to cover all of them. Multiemployer bargaining requires union agreement because it merges the employees of all member employers into a single bargaining unit. The resulting contract is then ratified by a single vote among covered employees. In coordinated bargaining, there is no merger of separate bargaining units. Rather, a group of unions or employers coordinate their strategies – which may extend to insistence on similar contract terms – but negotiate separate contracts for separate units of employees. *See generally* Hensley and Jansonius, *The Interaction of Federal Labor and Antitrust Policies: An Analysis of the Legality of Coordinated Collective Bargaining by Employers*, 40 Southwestern L. J. 967 (1986); *see also* App. 66a-67a.

On March 27, 1990, Petitioners and the Union held an initial meeting during which West Coast's president, Fred Long, gave the Union's president and chief negotiator, Robert Knox, a memorandum which stated that Petitioners would engage in coordinated bargaining and that their bargaining positions and proposals would be essentially the same. App. 6a. Knox immediately asked if Petitioners had entered into any kind of mutual aid pact. App. 7a. Long answered that they had an "understanding," but stated that he was instructing his clients not to respond because it was not a relevant subject for bargaining, so Knox could take his answer as "no response." App. 53a-54a. Knox asked if any distributor could use a negotiator other than West Coast and Long said that they could. App. 22a.

Knox continued to inquire about any agreement among Petitioners. In one form or another, the issue was raised five times between April and September 1990. App. 53a-54a. On each occasion, West Coast told him it was "none of [his] business" or refused to respond. *Id.* At a bargaining session on September 20, 1990, Knox directly asked two distributor representatives whether there were "a written or oral document that binds you distributors together in any way," and was told there was not. App. 9a, 54a.

Months of negotiations were unsuccessful. Petitioners three times filed unfair labor practice charges against the Union which the General Counsel found to have merit. Specifically, the General Counsel found that the Union failed to provide information necessary for bargaining, engaged in surface bargaining and dilatory tactics, and continued surface bargaining in individual negotiations with one of the distributors. App. 108a-114a. The Union settled each charge informally with the National Labor Relations Board ("NLRB" or "Board") and pledged to bargain in good faith. *Id.*

Petitioners announced a negotiating impasse in September 1990. App. 9a-10a. After further negotiations, they implemented the non-economic proposals of their final offers on February 7, 1991, and the economic terms of their offers on April 15, 1991. *Id.*

On April 3, 1991, the Union filed an unfair labor practice charge which alleged that the February 1991 implementations had preceded a good-faith impasse.[2] App. 11a-12a. The charge alleged only "bargaining in bad faith" and did not specify that the Union was also alleging unlawful nonconsensual multiemployer bargaining. App. 11a-12a. In its investigation, the Region asked no questions and requested no documentation relating to the alleged multiemployer bargaining. Petitioners learned that the charge included allegations of multiemployer bargaining without consent when the charge was dismissed on June 20, 1991. App. 12a.

After the dismissal, complaint issued on July 26, 1991 concerning two aspects of Petitioners' February 1991 implementations.[3] App. 13a. The complaint was amended to challenge implementation of the economic proposals in

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[2] An impasses occurs "after good-faith negotiations have exhausted the prospects of concluding an agreement." *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1977). Any employer may then make unilateral changes that are substantially consistent with its last offer. *Atlas Tack Corp.*, 226 N.L.R.B. 222, 227 (1976), *enf'd*, 559 F.2d 1201 (1st Cir. 1967). Implementation prior to a bona fide impasse violates sections 8(a)(1) and (5) of the Act, 29 U.S.C. § § 158(a)(1) and (5) (1988). *See, e.g., NLRB v. U.S. Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993).

[3] The Region challenged the longer probationary period for new employees and a new classification of "casual" employees that were part of the terms implemented by the Petitioners in February 1991. App. 48a-49a.

April 1991. *Id.* The Union appealed the dismissal of its charge of unlawful multiemployer bargaining. *Id.*

At the same time, by mid-June 1991, the Union was certain that Petitioners were bound by a written agreement. Specifically, Knox testified:

> It was just a meeting or two before [a bargaining session on July 12, 1991] . . . And I thought to myself, you know, with the offer we have on the table . . . why don't we get an agreement with Eastown. . . . And it was very clear to me that they just could not make the decision for themselves. They were, in fact, you know --- well, marching in lock step . . . . So I figured they had to have some sort of document that bound them together.

App. 121a-122a.

At the July 12, 1991 bargaining session, a Union attorney demanded a copy of any agreement between Petitioners. App. 54a. In response, West Coast explicitly told the Union that there was a written pact. *Id.* West Coast confirmed the existence of the Pact in a July 16, 1991 letter to the Union, stating that Petitioners would be prepared to show the Pact to the Union if the Union could demonstrate its relevance and supply "case authority" requiring its production. App. 54a-55a. The Union never provided any legal authority in support of its request and Petitioners did not give them a copy of the Pact. *Id.* The Union failed to notify the General Counsel of this new evidence to support its pending charge or to seek a Board subpoena for the document.

On July 6, 1992, Long wrote to the General Counsel's Office of Appeals. Long's statement of position referenced the Pact and argued that Petitioners had not

violated the law but only engaged in lawful coordinated bargaining. App. 49a-50a. The General Counsel failed to question or pursue the matter further and never requested a copy of the Pact before sustaining the dismissal of the charge on July 28, 1992.

On November 16, 1992, pursuant to a trial subpoena, Petitioners produced the Pact. App. 14a. More than three months later, on February 18, 1993, the General Counsel was allowed to revive the multiemployer bargaining allegations that had been first dismissed in June 1991 and then again in July 1992. App. 12a-14a. The amended complaint alleged that the Pact created "a de facto multi-employer association and/or bargaining coalition." App. 50a.

2. The Board's Decision

After a lengthy hearing, an Administrative Law Judge ("ALJ") of the Board found that the Pact created a multiemployer bargaining group without Union consent. App. 84a. He concluded that the resuscitation of the April 1991 charge in February 1993 was not time barred by Section 10(b) because the distributors "fraudulently concealed" the Pact. App. 57a. As the last act of concealment to the Union, the ALJ cited the September 20, 1990 bargaining session at which two distributor representatives had denied that there was a pact. App. 54a. The ALJ also acknowledged, however, that Petitioners later explicitly told the Union that the Pact existed on July 12, 1991. *Id.* And, while he disapproved of Petitioners' failure to reveal the terms of the document to the Union, the ALJ was unable to locate any authority imposing such a duty upon them. App. 55a. ("I have substantial doubt that the Union would be entitled to complain of Long's refusal to produce [the Pact].").

The ALJ did not address the Union's bad faith bargaining, reasoning that in light of his finding that Petitioners' bargaining was unlawful from its inception, "[n]othing the Union did or failed to do makes any difference." App. 85a.

As to the General Counsel's inaction, the ALJ stated that Long's letter to the Office of Appeals, which the ALJ equated to the denial of an unfair labor practice, should prompt the Board to change its standard for fraudulent concealment and to find that such a denial constitutes fraudulent concealment. App. 56a n.6. ("Perhaps the time is ripe for the Board to reconsider its past reluctance to consider denials as constituting sufficient acts of concealment that might extend the 10(b) period."). The Board (and the Sixth Circuit) did not accept or address the ALJ's suggestion on changing the law. Instead, the Board affirmed the ALJ with a single statement: "[A]s the judge found, the amendment [to the General Counsel's complaint] was appropriate for the additional reason that the Respondents' fraudulent concealment *of the existence of the pact* tolled the 10(b) period." App. 30a (emphasis added).[4]

Both the ALJ and Board alternatively held that the "closely related" doctrine provided a basis for reviving the allegations of unlawful multiemployer bargaining notwithstanding the strictures of Section 10(b). App. 29a-

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[4] In addition, the Board agreed with the ALJ that Petitioners had not violated the Act with their probationary employee proposal. It declined to rule on the alleged violation relating to casual employees. App. 29a. Other aspects of the complaint, relating to specific implemented terms, were sustained.

30a, 50a-53a. Petitioners do not challenge this holding here, but the closely related doctrine does not justify the decision below.[5]

3. The Decision of the Sixth Circuit

On appeal, the circuit court agreed that "the facts could scarcely be stronger in support of the NLRB's finding of fraudulent concealment." App. 21a. It applied the test that "[f]raudulent concealment of a material fact underlying an unfair-labor-practice charge tolls the six-month limitations period." *Id.* Consistent with this two-part standard, it dismissed as "border[ing] on the disingenuous" Petitioners' arguments that the Union failed to exercise diligence in pursuing its rights. App. 22a.

The decision identified various acts of concealment from the Union that the court of appeals deemed sufficient to toll Section 10(b), the last one of which occurred in September 1990.[6] Specifically, it cited the fact that in an NLRB unit clarification proceeding involving only one distributor and before negotiations began, the Pact was not

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[5] The closely-related doctrine, which allows related allegations to be added to a timely charge, does not permit the finding of a violation based upon conduct which occurred more than six months before the filing of a timely charge. App. 29a-30a. Thus, application of the doctrine limits the relevant time period to six months before April 3, 1991, *i.e.*, October 3, 1990. The Board never conducted such an analysis here, App. 29a-30a, although the law is clear that one party's bad faith may excuse the other's. App. 23a. *See Local 777, Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862, 911 (D.C. Cir. 1978) (union's bad faith may excuse the employer's obligation to bargain); *Chicago Tribune Co.*, 304 N.L.R.B. 259, 260 (1991) (same). A remand for that analysis will be necessary.

[6] Like the Board, the court of appeals did not accept or address the ALJ's alternative suggestion that the law be changed to deem the denial of an unfair labor practice "fraudulent concealment."

produced in response to a Union subpoena to which it would have been responsive. App. 21a; *see* App. 54 n.5. The court also cited Long's "flagrant[ ] misrepresent[ation]" of the Pact's terms at the first negotiating session on March 27, 1990,[7] App. 22a, and Petitioners' "generally evasive" responses when asked about the existence of the Pact. App. 21a. In particular, the court cited to Long's statement to Knox that the existence of a pact was "none of his business," at the second bargaining session on April 18, 1990. App. 21a, 54a. The court also relied upon the September 20, 1990 statement by two distributor representatives that no mutual aid pact existed. *Id.* In addition, the court faulted Petitioners for failing to voluntarily produce the Pact during the General Counsel's investigation. App. 21a.

The decision recognized that West Coast had disclosed the existence of "some kind of agreement early in the negotiations." App. 10a n.3. It did not address the oral and written confirmations of the existence of the Pact in July 1991. Rather, the decision found "the disclosure of the *existence* of the Pact . . . immaterial . . . [because] the question is whether the Distributors disclosed the *terms* of the Pact." *Id.* (emphases in original).

As a result of this analysis, the court of appeals enforced the Board's order.

REASONS FOR GRANTING THE WRIT

This case presents the question of whether the "fraudulent concealment" exception to Section 10(b) is limited to instances in which a charging party exercises

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[7] The court cited to page 1674 of the Joint Appendix, which concerns testimony about the bargaining notes of a distributor representative from the March 27, 1990 session.

reasonable diligence in its own behalf or whether, as found by the court below, an early concealment excuses later inaction without regard to the aggrieved party's actual state of knowledge or diligence in pursuing its rights. The decision of the court of appeals has created an unprecedented and broad standard for tolling Section 10(b), which is inconsistent with the legal standard applied in all other circuits and contrary to guidance from this Court regarding applicability of the fraudulent concealment doctrine to all federal statutes. By absolving a charging party of its obligation to act within six months of notice of a potential violation, the decision effectively eliminates the congressionally-mandated statute of limitations in cases where material information was concealed at any time.

Because Section 10(b) applies to every unfair labor practice charged under the NLRA, and is imported for other causes of action under federal labor law, the decision has broad implications for a recurring and important issue affecting the administration and enforcement of federal labor laws. Review by this Court is warranted.

1. Section 10(b) of the NLRA prohibits litigation of purported unfair labor practices that occurred more than six months prior to the filing and service of a charge. *Machinists Local Lodge No. 1424 (Bryan Manufacturing) v. NLRB*, 362 U.S. 411, 416, 424-25 (1960). *Bryan Manufacturing* identified the congressional imperatives underlying the choice of such a short limitations period, namely "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused' . . . and . . . to stabilize existing bargaining relationships" in furtherance of industrial peace. *Id.* at 419 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., p.40). "As expositor of the national interest, Congress, in the judgment that a six month limitations period did 'not seem unreasonable,' . . . barred the [National Labor Relations]

Board from dealing with past conduct after that period had run, even at the expense of the vindication of statutory rights." *Id.* at 429. "[T]he intended purpose of [Section 10(b)] is that, in the absence of a properly served charge on file, a party is assured that on any given day its liability under the Act is extinguished for any activities occurring more than six months before." *Chemung Contracting Corp.*, 291 N.L.R.B. 773, 774 (1988).

In *Ducane Heating Corp.*, 273 N.L.R.B. 1389 (1985), *enf'd without opinion*, 785 F.2d 304 (4th Cir. 1986), the Board interpreted Section 10(b) to bar the reinstatement of a dismissed charge outside the six-month limitations period. However, the Board announced that it would toll the limitations period when "a respondent fraudulently conceals the operative facts underlying the alleged violation" and would begin it again when "the charging party knows or should have known of the concealed facts." *Id.* at 1390. In effect, *Ducane* "borrowed the federal doctrine of fraudulent concealment, which is an 'equitable doctrine read into every federal statute of limitations.'" *Truck Drivers & Helpers Local 170 v. NLRB (Girardi Distributors)*, 993 F.2d 990, 995 (1st Cir. 1993) (*quoting Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)).

The Board and the D.C. Circuit have slightly refined the *Ducane* analysis in a series of decisions in which the Board abandoned "operative facts" and adopted the "material

facts" standard set forth by that circuit in *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977).[8]

However, until the ruling here, the scope of the fraudulent concealment doctrine under Section 10(b) has consistently been limited to cases where the charging party could prove that it did not know, and *could not have known*, of its potential claim more than six months before the filing or revival of its charge. *Brown & Sharpe II*, 50 F.3d 1088; *Girardi Distributors*, 993 F.2d 990; *NLRB v. O'Neill*, 965 F.2d 1522 (9th Cir. 1992), *cert. denied*, 509 U.S. 904 (1993); *Landry v. Airline Pilots Assoc. Int'l*, 901 F.2d 404 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990). *See also Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) ("the doctrine of fraudulent concealment does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim.")

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[8] *Brown & Sharpe Mfg. Co.*, 299 N.L.R.B. 586 (1990), *remanded sub. nom. District Lodge 64 v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991) (*Brown & Sharpe I*), *on remand, Brown & Sharpe Mfg. Co.*, 312 N.L.R.B. 444 (1993), *remanded sub. nom., Machinists District Lodge 64 v. NLRB*, 50 F.3d 1088 (D.C. Cir. 1995) (*Brown & Sharpe II*), *on remand, Brown & Sharpe Mfg. Co.*, 321 N.L.R.B. 924 (1996), *aff'd, Int'l Ass'n of Machinists and Aerospace Workers, District Lodge 64 v. NLRB*, 130 F.3d 1083 (D.C. Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 2319 (1998) (*Brown & Sharpe III*).

In *Brown & Sharpe II*, the Board noted that "[b]y embracing *Holmberg*, we do not necessarily adopt all the glosses on the fraudulent concealment doctrine set forth by various Federal courts." 312 N.L.R.B. at 444, n.5. With circuit court approval, one of the "glosses" the Board has declined to adopt is the theory of a self-concealing wrong enunciated in *Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). *See Girardi Distributors*, 993 F.2d at 997-98. Rather, the party seeking to toll Section 10(b) bears the burden of proof on all elements of the fraudulent concealment doctrine, including proof of an "affirmative act" of concealment. *Id.*

2. It is firmly established in all circuits but the Sixth that a charging party seeking to avoid Section 10(b) must prove that it exercised reasonable diligence in enforcing its rights. Inspired by this Court's guidance in cases such as *Armbrecht*, *supra*, the circuits use a three-part analysis, requiring (1) deliberate concealment of (2) material facts which (3) the aggrieved party does not know and could not have discovered through reasonable diligence. *Brown & Sharpe II*, 50 F.3d at 1092 ("'deliberate concealment of material facts' tolls the statute until the plaintiff discovers or with due diligence should have discovered the basis of the lawsuit."); *Girardi Distributors*, 993 F.2d at 995 ("the limitations period is tolled when 'a respondent fraudulently conceals the operative facts underlying the alleged violation' . . . [but] will begin to run anew when 'the charging party knows or should have known of the concealed facts.'"); *Landry v. Airline Pilots Assoc. Int'l*, 901 F.2d at 412-13 ("Allegations of fraudulent concealment do not free plaintiffs of their obligation to exercise reasonable diligence to discover frauds perpetrated against them once they are on notice that such acts might have occurred."); *NLRB v. O'Neill*, 965 F.2d at 1527 (reinstatement appropriate "because the unions themselves were diligent in filing and investigating their charges").

The decision below creates a new standard that eliminates the need to exercise – much less prove – reasonable diligence. Its test consists only of "[f]raudulent concealment of a material fact underlying an unfair-labor-practice charge." App. 21a. The court of appeals ignored the Union's suspicions, which reached a point of certainty by June 1991, that Petitioners "had to have some sort of document that bound them together" that prevented them from "mak[ing] the decision for themselves," App. 122a, and ignored Petitioners' oral and written notices to the Union in July 1991 that the Pact existed. The Union here did not

investigate, did not report its knowledge to the General Counsel, and did not pursue a copy of the Pact, even though it could easily have done so by asking the General Counsel to obtain a copy of the document while the charge was pending and before it was finally dismissed in July 1992. *See North American Rockwell Corp. v. NLRB*, 389 F.2d 866, 872 (10th Cir. 1968) ("The courts have universally recognized the General Counsel's authority under Section 11(1) to compel disclosure of evidence by persons charged with violations of the Act in advance of the unfair practice hearing.") (citations omitted).

In light of these uncontested facts, the Union failed to exercise reasonable diligence as a matter of law. The court's holding that Section 10(b) could nonetheless be tolled squarely conflicts with the principle that a party cannot sit on its hands once it has notice of a potential violation. *John Morrell & Co.*, 304 N.L.R.B. 896, 900 (1991), *aff'd, United Food & Commercial Workers Union v. NLRB*, 998 F.2d 7 (D.C. Cir. 1993) (Section 10(b) runs when a party suspects or should have suspected an unlawful scheme; a charging party cannot wait for documentary proof). *See also Girardi Distributors*, 993 F.2d at 999 (charging party cannot wait for a "smoking gun").

Contrary to the decision, fraudulent concealment alone does not absolve an aggrieved party from its duty to exercise reasonable diligence. In order to toll the statute of limitations, the concealment must actually prevent the aggrieved party from obtaining notice of a potential violation. *See, e.g., Landry*, 901 F.2d at 412-13; *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988), ("a plaintiff who has learned of facts which would cause a reasonable person to inquire further must proceed with a reasonable and diligent investigation, and is charged with knowledge of all facts such an investigation would have disclosed."). The Union is charged with full knowledge of the Pact as a matter

of law because it simply failed to act in the face of the existing evidence of a potential violation.

3. Apparently cognizant of the foregoing principles, the court of appeals attempted to excuse the Union's inaction by finding fraud in Petitioners' concealment of the "terms of the Pact," rather than its existence. App. 21a; *Compare* App. 30a. ("[F]raudulent concealment of the existence of the pact tolled the 10(b) period."). The court of appeals, however, relies exclusively on acts of concealment that occurred before the end of September 1990, before the Union observed the Petitioners' bargaining conduct, before it filed its unfair labor practice charge, and before it learned that Petitioners had a signed Pact which governed their relationship. *See* pp. __-__, *supra*.[9] In particular, the decision accused "Long and his associates [of] flagrantly misrepresent[ing] the Pact's terms." App. 22a. However, the basis for the court's accusation rests on testimony regarding statements made *at the first day of negotiations* in March 1990.[10] In effect, the court held that after an initial concealment, the statute of limitations starts to run only when an aggrieved party has detailed *proof* of its claim, not merely notice of its potential existence. This holding represents a radical departure from existing law.

Heretofore, the courts of appeals have agreed that Section 10(b) starts running when a claimant is on "inquiry notice," despite any prior concealment of material facts. *See*

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[9] In addition, the court below erred in blaming Petitioners for not turning over a copy of the Pact to the General Counsel. App. 21a. It is clear that Petitioners had no duty to turn over the Pact to the General Counsel or even to cooperate in the General Counsel's investigation. *See Brown & Sharpe III*, 130 F.3d at 1087-88.

[10] The court cited to J.A. 1674, *see* App. 118a, which reflected testimony concerning bargaining on March 27, 1990, at which "'Fred [Long] said they can retain someone else without penalty.'"

Girardi Distributors, 993 F.2d at 998 (*"Irrespective of the extent of the effort to conceal*, the fraudulent concealment doctrine will not save a charging party who fails to exercise due diligence, and is thus charged with *notice* of a potential claim.") (emphases added); *Brown & Sharpe I*, 949 F.2d at 449 (concealment tolls Section 10(b) until a charging party "discovers or with due diligence should have discovered the basis" of its charge); *Landry v. Airline Pilots Assoc. Int'l*, 901 F.2d at 412-13 ("Allegations of fraudulent concealment do not free plaintiffs of their obligation to exercise reasonable diligence to discover frauds perpetrated against them once they are *on notice* that such acts might have occurred.") (emphasis added); *see also Jensen v. Snellings*, 841 F.2d at 607 (plaintiff remains on "inquiry notice" even if defendants engaged in acts of concealment); *Hobson v. Wilson*, 737 F.2d at 35 (efforts to conceal irrelevant if a party is on notice of his claim).

Consistent with the standard applied by other circuits, the limitations period of Section 10(b) should have started running in this case in June or July 1991, more than nineteen months before the charge was reinstated. Union president Knox admitted that as of June 1991 he was certain that there was a "document that bound [Petitioners] together" and forced them to "march[ ] in lock step." App. 122a. On July 12, 1991, Knox received confirmation that such a written agreement existed. App. 54a. Section 10(b) thus expired no later than January 1992. *See Gardner v. International Telegraph Employees, Local No. 9*, 850 F.2d 518, 523 (9th Cir. 1988) (per curiam) ("[t]here was no concealment of the fact that a contract existed and that the Union would not give him a copy.").

Simply put, the Sixth Circuit's interpretation of the fraudulent concealment doctrine is plainly in error and casts doubt on the viability of Section 10(b)'s intentionally short time period. The Court should reaffirm the importance of

the "reasonable diligence" requirement and clarify the level of knowledge that is required to trigger Section 10(b): must a party act within six months of "inquiry notice" of a violation (as in all other circuits) or only, as here, when it has explicit documentary proof of the alleged violation?

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded so that an analysis accounting for both parties' bargaining conduct during the proper time frame can be conducted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 96-6704; 97-5140

DON LEE DISTRIBUTOR, INC. (WARREN); DON LEE DISTRIBUTOR, INC. (DEARBORN); POWERS DISTRIBUTING COMPANY, INC.; EASTOWN DISTRIBUTORS, CO.; HUBERT DISTRIBUTORS, INC.; AND OAK DISTRIBUTING CO.,
Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038,
Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Nos. 7-CA-31719(2)-(7), 7-CA-32164(1), 7-CA-32896, 7-CA-32986, 7-CA-33649, 7-CA-33707, 7-CA-31302

Argued: March 19, 1998

Decided and Filed: June 2, 1998

Before: BOGGS, NORRIS, and MOORE, Circuit Judges.

COUNSEL

ARGUED: Rosemary M. Collyer, CROWELL & MORING, Washington, D.C., for Petitioners. Sharon I. Block, NATIONAL LABOR RELATIONS BOARD, OFFICE OF THE GENERAL COUNSEL, Washington, D.C., for Respondent. Samuel C. McKnight, KLIMIST, McKNIGHT, SALE, McCLOW & CANZANO, Southfield, Michigan, for Intervenor. **ON BRIEF:** Rosemary M. Collyer, CROWELL & MORING, Washington, D.C., Patrick W. Jordan, JEFFER, MANGELS, BUTLER & MARMARO, San Francisco, California, for Petitioners. Sharon I. Block, NATIONAL LABOR RELATIONS BOARD, OFFICE OF THE GENERAL COUNSEL, Washington, D.C. Aileen A. Armstrong, Linda Dreeben, NATIONAL LABOR RELATIONS BOARD, APPELLATE COURT BRANCH, Washington, D.C., for Respondent. Samuel C. McKnight, Lisa M. Smith, KLIMIST, McKNIGHT, SALE, McCLOW & CANZANO, Southfield, Michigan, for Intervenor.

OPINION

BOGGS, Circuit Judge. This case comes to us on the petition of six Detroit-area beer distributors (collectively, "Distributors") to review an order of the National Labor Relations Board ("NLRB") finding that the Distributors committed unfair labor practices in violation of Sections

8(a)(1) and 8(a)(5) of the National Labor Relations Act ("NLRA"), and on the NLRB's cross-petition for enforcement of its order. We are confronted with two issues; first, whether the Distributors' conduct during collective bargaining sessions with the union representing their employees constituted unlawful "joint" or "multiemployer" bargaining, or merely constituted permissible "coordinated" bargaining; and second, whether the NLRB was time-barred from pursuing a claim against the Distributors based on unlawful multiemployer bargaining.

I

The Distributors are wholesale beer distributors operating in the Detroit area. Each of the six Distributors is separately owned and operated, except that Don Lee Distributors, Inc. (Warren) and Don Lee Distributors, Inc. (Dearborn), are both owned by a single parent company. The employees at each of the Distributors comprise separate bargaining units. For many years, the Distributors' drivers, warehouse employees, and reclamation employees have been represented for collective bargaining purposes by Local 1038, International Brotherhood of Teamsters, AFL-CIO ("Union"). In 1987, the Distributors joined forces with other beer distributors in the area to form the Downriver, Detroit, Oakland, and Macomb Wholesalers Association, Inc. ("DDOM") in an effort to negotiate more favorable terms with their respective groups of employees. Their efforts through the DDOM were successful; after a 12-week strike, the Distributors – apparently confronted with something of a "Prisoner's Dilemma" – were left to the "mercy of other . . . wholesalers" as several other DDOM members made individual deals with the Union on terms more favorable to the Union than the Distributors and other DDOM members originally had anticipated.

Dissatisfied with their DDOM experience, the Distributors decided in January 1990 to withdraw from the

association. Executives of each of the Distributors had met in December 1989 with Fred Long, the chief executive of a labor-relations firm called West Coast Industrial Relations Association, Inc. ("West Coast"), to discuss alternative ways of bargaining together to increase their bargaining power relative to the Union. Long told the Distributors that the problem with the 1987 DDOM negotiation was that the structure of DDOM permitted the Union to "whipsaw" DDOM members in the collective bargaining process.[1] To combat the whipsawing problem, Long advised the Distributors to enter into a mutual aid pact ("Pact") that provided, in pertinent part, as follows:

> 1. Each Distributor shall enter into its own Agreement with the Union. Nothing contained herein shall be construed to reflect a multi-employer association nor create a multi-employer unit. This document reflects a coordinated bargaining effort among individual and independent Distributors.
>
> 2. Each Distributor shall share costs and expenses of Fred R. Long and his associates who shall represent the Distributors['] bargaining efforts with the Union . . . .
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> * * *
>
> 7. Distributors agree to the establishment of the minimum objectives, described in Exhibit B, for a new

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[1] "Whipsawing" is a "union stratagem seeking to obtain benefits from a number or group of employers by applying pressure to one, the objective being to win favorable terms from the one employer and then use this as a pattern, or perhaps a base, to obtain the same or greater benefits from the other employers, under the same threat of pressure (including a strike) used against the first one." *See* Roberts Dictionary of Industrial Relations (rev. ed. 1971); *see also* Webster's Third New Int'l Dictionary (1986) ("3: to use more favorable terms gained (as in one company) as the precedent or leverage to win equal or greater concessions from (as a related company).").

Collective Bargaining Agreement which can only be changed by a majority vote of the participating Distributors.

8. In the event any Distributor is in breach of this Agreement or negotiates directly with the Union (or any other Union or person or group who allegedly is representing this Union's Interest) or agrees to settle on terms and conditions in excess of those listed in item 7 herein above, that Distributor, in addition to any other damages for breach of this Agreement that may occur in any enforcement law suit brought by any of the other Distributors shall, in addition, pay to each of the other Distributors a penalty fee of $400,000 to each.

The "minimum objectives" mentioned in Paragraph 7 of the Pact, which vary markedly in relative specificity, were listed as follows:

1. Eliminate eight (8) hour minimum/maximum day.
2. Remove load limit.
3. Overtime after forty (40) hours per week.
4. Management rights clause.
5. More restrictive grievance procedure.
6. Single pay holidays.
7. Simplified vacation language.
8. Four (4) weeks maximum vacation, red circle everyone over.
9. Cooler and basement deliveries required.
10. Reduction in wages.
11. Refined benefit pension plan – percentage of earnings.
12. Insurance revisions.

13. No curfew.
14. Bulk deliveries.
15. Zipper clause.
16. Empty pick up rate.
17. Longer probation period.
18. No restrictions on number of part-time employees.
19. Reduction on commission when helper is used.
20. More flexibility with reclamation duties.
21. Common expiration date.
22. Minimum three year contract.

On January 18, 1990, the Distributors signed the Pact.

As the existing DDOM contract was set to expire in May 1990, the Distributors and the Union began making plans for a new round of collective bargaining in March 1990. Early on, Long's associates (on behalf of the Distributors) broached the idea of "joint" or "concurrent negotiations," but Robert Knox, the president of the Union and the chief Union negotiator, initially rejected this idea. On March 27, 1990, the Distributors and the Union held an initial meeting to discuss collective-bargaining issues. At this meeting, Long presented a memorandum to Knox detailing the Distributors' initial position. This memorandum stated that "the bargaining positions of each [Distributor] are the same and any proposal I offer for any one of them will be identical for the others for delivery department and warehousing department personnel representing the bulk of each bargaining unit." On the other hand, the memorandum also stated that "[i]t may also develop through the negotiating process even for delivery department or warehouse department personnel, that it is advantageous for a certain company and the union to agree

on a provision to acceptable to other companies or the union. Although the companies do not contemplate such differences, it is possible [illegible] may develop as issues are discussed. Such agreed upon differences, if any, would be incorporated into that company's contract."

At the March 27, 1990, meeting between the Distributors and the Union, Knox specifically asked Long whether the Distributors had entered into any kind of mutual aid pact. Instead of disclosing the existence and terms of the Pact, Long replied that the possible existence of a mutual aid pact was "none of his business and that it was not relevant to bargaining." Long did volunteer, however, that the Distributors had *not* pledged to negotiate exclusively through Long and that they could "retain someone else without penalty. Faced with Knox's reluctance to participate in any "joint" or "concurrent" bargaining, Long told Knox that if the Union insisted on separate bargaining, Long would conduct the bargaining session for one of the Distributors, after which a representative of one of the Distributors would insist on identical contract terms for each of the other five Distributors. Rather than participate in such a futile endeavor, Knox agreed to try the joint bargaining approach and "see how it progressed."

The first actual bargaining session was held on April 18, 1990. On that date, the parties exchanged initial proposals. Long presented six identical proposals, one for each of the Distributors. Long again refused to answer and stated that "that wasn't an appropriate subject for bargaining." Bargaining continued, with little progress, through April and most of May 1990.[2] At a bargaining session held on

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[2] Tellingly, on April 20, 1990, the Distributors sent a joint letter to their retail customers with numerous collective references: "our contract," "we are asking the union to eliminate featherbedding practices," and the like. They also formed a collective group called

(continued...)

May 22, 1990, the question of whether the Distributors were engaging in joint bargaining came up again, and again Long gave a somewhat evasive answer that suggested that certain Distributors could well end up agreeing to different contract terms. Despite this response, on June 8, 1990, Long wrote to Knox making clear that the Distributors would have a common, identical position on all major subjects of collective bargaining: Long stated that *[w]e* are coming close to having everything *we* need to refine *our* first proposal next week. . . . *We* will have our position on this issue refined soon. . . . *[O]ur* economic package, as it may develop in negotiations, will be conditioned on resolution of non-economic language and specifically elimination of restrictive provisions *we* define as featherbedding." (emphasis added). Sure enough, at the June 19, 1990, bargaining session, the Distributors once again presented six identical proposals, one for each Distributor.

In the late June and early July 1990 bargaining sessions, the Union representatives began insisting on separate bargaining. The Distributors vigorously resisted this idea, stating through Long at one point that "[t]he contract for all the distributors we represent is essentially identical . . . . [W]e believe that this ploy . . . represents nothing more than yet another dilatory tactic on your part." Nonetheless, the Union went forward with its plan, identifying specific issues unique to particular Distributors. For example, on July 16, 1990, the Union presented a comprehensive proposal covering only the Powers Distributing Co. Bargaining unit. On July 18, 1990, the Union proposed implementing a "daily route bidding system" at Don Lee (Dearborn). In response to these individualized proposals, the incongruously responded

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the Coalition for Job Preservation, publishing letters in local newspapers to similar effect.

with six identical counterproposals – even though the Union had made no proposal with respect to four of the six Distributors. On August 8, 1990, after the Distributors mysteriously made identical counterproposals despite the uniqueness of the Union's two Distributors-specific proposals, the Union requested that Long's associate, Chris Thomas, provide a copy of all documents showing the relationship between West Coast and the Distributors. Thomas refused to provide the requested documents, stating that they were confidential.

On September 5, 1990, Thomas informed the Union that the Distributors' counterproposals on the route-bidding issue – the issue raised by the Union only with respect to one of the Distributors – were withdrawn because the Union had not responded to them. On September 11, 1990, West Coast transmitted what is called the Distributors' final offer, making clear that the Distributors were presenting "complete and identical" offers. At the same time, West Coast declared an impasse because of the apparent futility of further negotiations over such issues as compensation for drivers and co-payment of health care premiums. At the next bargaining session, on September 20, 1990, Knox specifically asked the Distributors whether there was "a written or oral document that binds you distributors together in any way." Two different Distributor representatives specifically said that there was no pact of any kind among the Distributors.

Between October 1990 and January 1991, several bargaining sessions were held at which the Union attempted to get the Distributors to consider Union proposals that raised issues unique to particular Distributors. The Distributors essentially rejected these overtures, continuing to assert that the Distributors had identical positions on all issues. Finally, on January 14, 1991, Thomas sent Knox a letter by certified mail stating:

> Mr. Knox, *we are at impasse at Eastown, Don Lee Pontiac, Don Lee Dearborn, Oak, Powers, and Hubert.* Each has the same identical position on the ten (10) key items herein noted amongst others. If there is no agreement on these ten (10) items, there can be no agreement with any of them.

On January 30, 1991, the Distributors simultaneously notified the Union that they would unilaterally implement the non-economic portion of their final offer on February 7, 1991. On April 10, 1991, the Distributors notified the Union that they would implement the economic portions of their final offer on April 15, 1991.

The parties held another bargaining session on July 12, 1991. At this session, an attorney for the Union requested production of any document "that spelled out the employers' relationship to each other for purposes of collective bargaining." The Union's attorney also specifically asked whether "there were any penalty provisions amongst the distributors." Thomas, representing the Distributors, declined to provide the requested information. Thomas later took the position that the Pact was subject to the attorney-client privilege because Long (whose signature does not appear on the Pact) is a member of the Michigan bar.[3]

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[3] We recognize that the record contains some evidence suggesting that West Coast disclosed at least the existence of some kind of agreement early in the negotiations. For two reasons, we do not discuss this evidence in detail. First, in reviewing the NLRB's order our only task is to ascertain whether substantial evidence supports the order, and not to irrespective of whether there is evidence that could support a contrary conclusion. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Second, the disclosure of the *existence* of the Pact is immaterial to the legality of the Distributors' conduct. As explained below, an agreement providing for coordinated bargaining is perfectly lawful, while one that provides for multiemployer bargaining without the Union's consent is a violation of the NLRA. Thus, the question is whether the Distributors

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Several months later, two individual distributors unilaterally changed the conditions of employment for Union members in ways that are contested in this case. In November 1991, Don Lee (Dearborn) changed its drivers' routes based solely on the drivers' performance, without regard to seniority, and without the opportunity to bid on routes that had been respected under the 1987 DDOM contract. In July 1992, Powers Distributing informed its drivers that it would discipline any driver who returned an improperly filled empty can collection bag (referred to by the Union as Powers's new "can bag" policy), despite the fact that under the 1987 DDOM contract drivers were not penalized for inadvertently returning less-than-full bags of aluminum cans for recycling.

II

Because the Distributors assert a limitation defense, we find it useful to summarize in detail the procedural history of this case; in doing so, we bear in mind the critically important fact that the Distributors consistently refused to disclose the terms of the Pact until an exceedingly late date.[4]

The charge at issue in this case was filed by the Union on April 3, 1991. The charge alleged simply that "[i]n the

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(continued . . .)
disclosed the *terms* of the Pact, not merely whether the Distributors disclosed its existence.

[4] For example, in March 1990 (three months after the Distributions entered into the Pact), one of the Distributors failed to produce a copy of the Pact in response to a subpoena that requested "[a]ny and all documents . . . pertaining to the Employer's membership or participation in *any* employer association or to the Employer's assignment of bargaining and/or representational rights and/or responsibilities to any such employer association or entity or individual including West Coast Industrial Relations, Fred Long, Patrick Jordan, or the firm of McLaughlin and Irvin from January 1, 1988 to the present.

six months prior to the filing of this Charge, the Employer[s] ha[ve] violated Section 8(a)(5) of the [National Labor Relations] Act by bargaining in bad faith and by, on or about February 4, 1991, unilaterally implementing terms and conditions of employment prior to reaching a *bona fide* impasse." On June 20, 1991, the Regional Director of the NLRB declined to use a complaint with respect to the Union's allegations. In particular, the Regional Director concluded that there was no evidence that the Distributors had unlawfully engaged in multiemployer bargaining without the Union's knowledge or consent:

> The investigation revealed that above six Employers all secured the services of the same labor relations consulting firm to represent them in their efforts to reach agreement with the Charging Union regarding a collective bargaining agreement. The Employers admittedly sought the same contract language and bargaining to that end.
>
> The parties met regarding each of the six companies on a rotating basis. There is no evidence that the Employers wished to change the scope of the six individual units or combine them into one unit. Nor is there any evidence that, in the event an overall agreement is reached, that the Employers intend not to bargain individually over issues which might pertain to each respective company. I conclude that the Employers are permitted to bargain in a group with a single representative of their choice and to negotiate for identical language in their collective bargaining agreement with the Charging Union.[5] .

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[5] The Union, as intervenor, has opposed the Distributors' motion to take judicial notice of the Regional Director's decision, although the NLRB has not (and, indeed, has stipulated to its authenticity). Pursuant to Fed. R. Evid. 201, we have held that it is

(continued...)

In reaching this decision, the Regional Director did not have the benefit of seeing the text of the Pact.

The Union appealed the Regional Director's refusal to issue a complaint based on the Distributors' alleged unlawful multiemployer-bargaining practices. In connection with this appeal, Long wrote a letter to the NLRB's Office of Appeals in which he stated that, while the Distributors did have a "mutual aid pact," it was solely for the purpose of sharing the cost of negotiations and contained no provision "that would restrict [the individual Distributors'] bargaining." On July 28, 1992, the Office of Appeals sustained the Regional Director's decision, stating that "the evidence was insufficient to meet the burden of establishing that [the Distributors] had entered into an agreement to restrict separate agreements by the parties or that [the Distributors] had attempted to combine all the bargaining units into one unit." The record before the Office of Appeals did not include a copy of the Pact.

Notwithstanding his initial refusal to file a complaint, on July 26, 1991, the Regional Director did issue a complaint challenging two specific aspects of the Distributors' February 1991 actions: their imposition of a longer probationary period for new employees, and their new classification of "casual" employees. Shortly thereafter, the Regional Director amended the complaint to challenge the legality of the Distributors' unilateral implementation of its economic proposals in April 1991 without first reaching a bona fide impasse.

(continued . . .)

appropriate to take judicial notice of "adjudicative facts" such as agency and judicial decisions, even where those decisions contain disputed statements of fact, as long as we take judicial notice for some purpose other than to take a position on the disputed fact issue. *See, e.g., United States v. Garland*, 991 F.2d 328, 332 (6th Cir. 1993).

The Distributors did not produce a copy of the Pact until the beginning of the administrative hearing in this matter (on November 16, 1992), after a subpoena had been issued for its production. Shortly thereafter, the General Counsel moved to amend the complaint to allege that the Pact,

> which was concealed from the Union, was actually an agreement forming "a de facto multi-employer association and/or bargaining coalition" and that from March 27, 1990, the first negotiating session, [the Distributors] bargained illegally as a multiemployer association or engaged in coalition bargaining, without the Union's consent. Thus, no valid impasse was reached. Furthermore, [the Distributors'] multiemployer or coalition bargaining was "bad faith and/or surface bargaining," but only from October 3, 1990, which was 6 months prior to the filing of the charge.

Over the Distributors' objection, the administrative law judge ("ALJ") granted the General Counsel's motion to amend the complaint.[6]

After a lengthy hearing, the ALJ ruled in favor of the General counsel in an opinion dated December 1, 1994. The ALJ found that the Pact created an unlawful multiemployer bargaining collective that rendered the entire course of the Distributors' conduct toward the Union unlawful. Accordingly, the ALJ ordered "that all Respondents . . .rescind the February 7 and April 15, 1991 implementations of the last, best, and final offers and restore all terms and

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[6] Among other things, the Distributors argued that the proposed amendment was time-barred by the six-month limitation period applicable to charges of unfair labor practices under the NLRA. The ALJ concluded that the amendment was not time barred, both because the Distributors had fraudulently concealed the existence and substance of the Pact, and because the multiemployer-bargaining allegation was closely related to the original allegations of the complaint.

conditions of employment to the status quo before the unilateral changes, to the extent that such were detrimental to its employees. That includes eliminating the new causal employee classification and probationary employee clause and making whole those employees who were affected by Respondents' illegal implementations. . . . I shall order Powers to remove that discipline [for violation of the new "can bag" policy] from the employees' personnel files . . . ."

In a decision and order dated November 8, 1996, a three-member panel of the NLRB essentially adopted the reasoning and order of the ALJ. The Distributors' petition for review, and the NLRB's cross-petition for enforcement, followed shortly thereafter.

III

It is particularly appropriate, in light of the parties' radically divergent views of the record evidence, to emphasize before addressing the merits of this case that we must enforce the NLRB's order as long as it is supported by substantial evidence on the record viewed as whole, even if evidence also exists that possibly could support a conclusion different from that reached by the NLRB. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 497 (1951).

A

The NLRA requires employees to bargain in good faith with the designated representative of a defined bargaining unit of the employer's employees. *See* 29 U.S.C. § 158(a)(5). The duty to bargain in good faith is limited to issues of wages, hours, and other terms and conditions of employment – the so-called mandatory subjects of bargaining. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210 (1964). However, when a party so strenuously refuses to bargain on a nonmandatory subject (such as the scope of the bargaining unit) that the result is an impasse, that party violates Section 8(a)(5) of the NLRA.

See NLRB v. Borg-Warner Corp., 356 U.S. 342, 348-50 (1958).

Following the principle that an impasse caused by absolute insistence on a particular bargaining unit is a violation of the duty to bargain in good faith, the NLRB and the courts have held that "joint bargaining" or "multiemployer bargaining" – either by a group of employers who refuse to bargain separately, or by a group of separate employee bargaining units who refuse to do so – without the other party's consent constitutes unlawful insistence on a nonmandatory subject, namely, the expanded scope of the bargaining unit. *See, e.g., Utility Workers Local 111 (Ohio Power)*, 203 NLRB 230, 238 (1973), *enf'd*, 490 F.2d 1383 (6th Cir. 1974) (finding union to have violated NLRA by "insisting that final settlements of the collective-bargaining contracts covering separate units of employees of Ohio Power, Central Operating, and Wheeling Electric be withheld until final agreement was reached between the Respondents and the Employers in all the units in which the bargaining was taking place.). On the other hand, both the NLRB and the courts also have recognized that "coordinated bargaining," a practice whereby parties share information and coordinate efforts but ultimately retain the authority to negotiate contract terms individually, is lawful under the NLRA. *See, e.g., General Electric Co.*, 173 NLRB 2523 (1968), *enf'd*, 412 F.2d 512, 514 (2d Cir. 1969).

The principal question presented by this case is whether the Pact created an unlawful multiemployer bargaining relationship among the Distributors, or whether the Pact merely reflected a lawful agreement to form a coordinated bargaining group within which each member would retain independent contract-making authority. There are no "magic words" that distinguish an agreement for unlawful multiemployer bargaining from a simple coordinated bargaining agreement. *See City Roofing Co.*, 222 NLRB 786, 789 (1976), *enf'd sub nom. NLRB v. R.O. Pyle Roofing*

Co., 560 F.2d 1370 (9th Cir. 1977). Instead, the task of a reviewing agency or court is to examine the totality of the circumstances surrounding the agreement to determine whether the signatories truly retain independent bargaining authority, or whether the group of signatories retains effective veto power over the bargaining behavior of individual group members. *See Utility Workers*, 203 NLRB at 239 ("a policy such as uniformity, innocent in and of itself, can in context become a vital part of an illegal pattern of conduct").

Here, the record is replete with evidence that the Distributors in fact conducted unlawful multiemployer bargaining. For example, while the Pact specified several seemingly flexible bargaining goals, it also laid down several specific non-negotiable contract terms applicable to all Pact signatories. See *supra*, at 5-6 (specifying, for example, "[c]ooler and basement deliveries required," "no curfew," "no restrictions on number of part-time employees," and "common expiration date"). The Pact further provided a huge financial penalty to any Distributor that either deviated from any of the specific contract terms or negotiated directly with the Union; such a Distributor would have to pay $400,000 to each other party to the Pact, a total of $1.6 million for each violation.[7] Perhaps most tellingly, no Distributor ever offered a contract proposal different from that offered by every other Distributor, even when the Union made a proposal addressing an issue unique to a particular Distributor, an identical counterproposal was always forthcoming from all six Distributors.

Against this factual backdrop, the Distributors argue that the Pact in fact reflected only an innocent coordinated-

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[7] Because Don Lee (Warren) and Don Lee (Dearborn) were owned by the same parent company, they collectively count as only one Distributor for purposes of the Pact.

bargaining strategy. The Distributors advance three principal arguments: first, they argue that the Pact did not actually confer "veto" power on the collective; second, they assert that, contrary to the ALJ's finding, the Distributors did not "reach an agreement . . . about exactly what they wanted" in the Pact; and third, they contend that the Pact's requirement that the Distributors not negotiate "directly" with the Union did not necessarily preclude individual agreements with the Union. The Distributors' arguments misapprehend the scope of substantial-evidence review. The ALJ's conclusion that the Pact effectively conferred collective veto power on the Distributors is supported both by the Pact language imposing a $1.6 million fine on any Distributor that reached an agreement with the Union consistent with the express provisions set out in the Pact, and by the fact that no Distributor provided an individual offer (even in the face of Distributor-unique proposals offered by the Union). With respect to the ALJ's finding that the Pact reflected an *ex ante* agreement on "exactly" what the Distributors wanted in their contracts, it is true that some of the Pact's contract provisions are vague (e.g., "[m]ore restrictive grievance procedure"); however, other provisions are quite specific and leave no room for negotiation (e.g., "[n]o curfew"). Finally, on the issue of whether the "no direct negotiation" clause precluded individual Distributors from reaching individual agreements with the Union, the ALJ certainly was entitled to infer from the Distributors' actual behavior that the Pact precluded such agreements. The fact is that, even when presented with Distributor-specific proposals that had no application or relevance to any other Distributor, each of the six Distributors responded with an identical counterproposal. On this record, there is at least substantial evidence – we would be more likely to call it overwhelming evidence – that the Distributors were engaged in unlawful multiemployer bargaining without the Union's consent.

B

The Distributors' secondary argument is that, even if their conduct constituted unlawful multiemployer bargaining, the General Counsel's complaint focusing on this charge was untimely. Section 10(b) of the NLRA provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. . . ." 29 U.S.C. § 160(b). "[T]he intended purpose of [Section 10(b)] is that, in the absence of a properly served charge on file, a party is assured that on any given day its liability under the Act is extinguished for any activities occurring more than six months before." *Chemung Contracting Corp.*, 291 NLRB 773, 774 (1988). Here, the Distributors argue that the multiemployer-bargaining charge is time barred because the Union should have been aware of the Pact by July 1990, but did not lodge a complaint with the Regional Director until April 1991. Alternatively, the Distributors argue that the six-month limitations period ran between the date on which the Regional Director declined to file a complaint on the multiemployer-bargaining issue (October 1991) and the date on which the issue was revived via the General Counsel's motion to amend (February 1993). In response, the NLRB argues that it is entitled to tolling of the limitations period both because the multiemployer-bargaining allegation is closely related to other, timely-filed allegations contained in the complaint, and because the Distributors fraudulently concealed the substance of the Pact during the entire course of collective bargaining.

There are at least two generally recognized exceptions to the six-month filing rule. First, a complaint may be amended to add allegations relating to conduct more than six months old as long as the conduct occurred no more than six months before the filing of the charge underlying the complaint, and as long as the allegations in the amendment are closely related to that charge. *See, e.g., Henry Bierce Co. v. NLRB*, 23 F.3d 1101, 1108 n.1 (6th Cir 1994); *Truck Drivers & Helpers Union. Local No. 170 v. NLRB*, 993 F.2d 990, 1000 (1st Cir. 1993). Relying on its decision in *Redd-I, Inc.*, 290

NLRB 1115 (1988), the NLRB ruled here that the multiemployer-bargaining amendment was timely because it was closely related to the original charge's allegation of unilateral implementation of employment conditions before a bona fide impasse was reached. The NLRB reasoned that "the joint bargaining allegation is of the same class of violation in that it concerns negotiating conduct governed by Section 8(a)(5) of the Act; it involves the same factual setting and sequence of events, in that all the theories call for analysis of the entire course of bargaining; and the Respondents raised virtually the same defenses."

The Distributors' primary argument against application of the "closely related" exception to the six-month limitations period is that the date on which the Pact was signed (January 18, 1990) was almost 15 months before the date on which the original charge was filed (April 3 , 1991). This argument is nonresponsive. The Union's complaint is based not on the Distributors' act of signing the Pact, but on their behavior during the entire course of collective bargaining. It is undisputed that the alleged unfair labor practice of bargaining without disclosing the terms of a multiemployer-bargaining agreement occurred within six months of the date on which the original charge was filed, and therefore we are not persuaded by the Distributors' primary argument. Secondarily, the Distribution assert that there is insufficient factual commonality between the multiemployer-bargaining charge and the charges contained in the original complaint to support a "closely related" finding. Under the substantial evidence test, however, we must affirm the NLRB's decision because the record demonstrates that the amendment involved the same statutory provision, required assessment of the same Distributor conduct implicated in the original complaint charges, and demanded consideration of the same evidence. The amendment, after all, need not be identical to the charges contained in the original complaint; it need only be "closely related," and the NLRB has shown substantial

evidence here that it is. *Cf. United States Can Co. v. NLRB*, 984 F.2d 864, 867 (7th Cir. 1993) (affirming NLRB's finding that amendment was "closely related" to original complaint allegations because substantial evidence supported agency's finding that new allegations involved same basic employer conduct a sold allegations).

The second generally recognized exception to the six-month filing requirement is fraud, and we would be hard-pressed to disagree with the NLRB's finding that the Distributors fraudulently concealed the terms of the Pact. Fraudulent concealment of a material fact underlying an unfair-labor-practice charge tolls the six-month limitations period. *See, e.g., Ducane Heating Corp.*, 273 NLRB 1389, 1390 (1985), *enf'd*, 785 F.2d 304 (4th Cir. 1986); *cf. Davis v. Smith's Transfer, Inc.*, 841 F.2d 139, 140 (6th Cir. 1988) (recognizing fraudulent concealment doctrine but finding facts insufficient to toll limitations period). Here, the facts could scarcely be stronger in support of the NLRB's finding of fraudulent concealment. The Union repeatedly asked about the existence of a mutual aid pact, beginning with the very first collective bargaining session. The Distributors' responses were generally evasive (*e.g.*, Long's statement to Knox that the existence of the Pact was "none of his business and that it was not relevant to bargaining," *see* J.A. at 1556), and were sometimes downright untruthful (*e.g.*, the statement of two Distributor representatives that there was no mutual aid pact at all, *see id.* at 1780). During the Regional Director's investigation, no copy of the Pact was produced; it was not until an administrative subpoena was issued in connection with the hearing before the ALJ that anyone other than the Distributors saw the text of the Pact.

Even were we inclined to accept the Distributors' argument that the Union was on notice of the *existence* of some agreement, the record makes absolutely plain that the Distributors kept the *terms* of the Pact a closely-held secret. Not only did the Distributors go so far as to ignore a

subpoena in another proceeding demanding production of a copy of the Pact, but Long and his associates flagrantly misrepresented the Pact's terms – going so far as to say, for example, that there was no penalty to any Distributor for negotiating directly with the Union, or for using a negotiator other than West Coast, *see* J.A. at 1674, when the Pact clearly prohibited such acts on pain of a substantial financial penalty. In the face of these facts, the Distributors' main argument against invocation of the fraud exception – that "[t]he Union and the General Counsel failed to exercise due diligence" – borders on the disingenuous. Moreover, it is no answer to say that the Union possibly knew that a pact existed when they clearly did not know its terms; the Union had no way to ascertain whether the Pact provided for lawful coordinated bargaining or unlawful multiemployer bargaining without knowing its precise terms. Accordingly, we hold that the NLRB correctly invoked the fraudulent concealment doctrine and properly permitted the complaint as amended to go forward.

C

The parties raise a number of other issues: the Union argues that Powers Distributing's unilateral "can bag" policy was unlawful (independent of the legality of the Pact) and that certain conditions imposed by some of the Distributors were inconsistent with the Distributors' final offers, and the Distributors argue that the Union's own bad faith during the course of the collective bargaining precludes a finding against the Distributors. Because we affirm the NLRB's order finding that the Distributors' entire course of conduct was unlawful, and therefore that no valid impasse was reached that would permit any Distributor to implement a "final offer" unilaterally, we need not address the Union's arguments. With respect to the Distributors' argument, we agree with the District of Columbia Circuit that where a party to collective bargaining imposes an unlawful precondition to bargaining – as here, where the Distributors

essentially conditioned bargaining on the Union's acceptance of the Distributors' multiemployer bargaining unit – that party's conduct excuses the other party's obligation to bargain in good faith. *See Local 777, Democratic U. Organizing Comm. v. NLRB*, 603 F.2d 862, 911 (D.C. Cir. 1978).[8] The essence of the NLRB's ruling in this case is that, by secretly entering into a pact that restricted the right of the individual Distributors to negotiate with the Union, the Distributors collectively had agreed in advance not to budge on a nonmandatory bargaining subject. The Union's subsequent bad faith, if there were such, is therefore irrelevant.

IV

For the foregoing reasons, the Distributors' petition for review of the NLRB's order id DENIED, and the NLRB's petition to enforce its order is GRANTED.

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[8] Unlike this case, the District of Columbia Circuit was confronted with a situation where the union, rather than the employer, imposed the unlawful precondition. The principle, however, is the same. Translating the District of Columbia Circuit's reasoning into the context of this case, we hold that "if [an employer] insists on speaking on behalf of persons for whom it cannot properly so insist, [a union] cannot be faulted for refusing to bargain." *Local 777*, 603 F.2d at 911 (quoting *NLRB v. Kelley Bros. Nurseries, Inc.*, 341 F.2d 433, 440 (2d Cir. 1965) (Friendly, J.)).

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Don Lee Distributor, Inc. (Warren), Don Lee Distributor, Inc. (Dearborn), Powers Distributing Company, Inc., Eastown Distributors, Co., Hubert Distributors, Inc., and Oak Distributing Co. and Local 1038, International Brotherhood of Teamsters, AFL-CIO

West Coast Industrial Relations Association, Inc. ***and*** **Local 1038, International Brotherhood of Teamsters, AFL-CIO and Don Lee Distributor, Inc. (Warren), Don Lee Distributor, Inc. (Dearborn), Powers Distributing Company, Inc., Eastown Distributors, Co., Hubert Distributors, Inc., and Oak Distributing Co., Parties of Interest.**
Cases 7-CA-31719(2)-(7), 7-CA-32164(1), 7-CA-32896, 7-CA-32986, 7-CA-33649, 7-CA-33707, and 7-CA-31302

NOVEMBER 8, 1996

DECISION AND ORDER

BY MEMBERS BROWNING, FOX, AND HIGGINS

On December 1, 1994, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondents filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a reply to the Respondents' exceptions and an answering brief. The Charging Party filed cross-exceptions and an answering brief to the Respondents' exceptions. Respondents filed a reply to

the Charging Party's answering brief. Respondents Don Lee Dearborn, Don Lee Warren, Powers, Eastown, and Oak filed a brief in reply to the General Counsel's answering brief; Respondent Hubert filed a separate reply brief. Respondents Don Lee Dearborn, Don Lee Warren, Powers, Eastown, and Oak filed an answering brief to the General Counsel's cross-exceptions and an answering brief to the Charging Party's cross-exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended order as modified.[3]

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[1] The Respondents have requested oral argument. The General Counsel and the Charging Party filed oppositions. The request is denied as the record, exceptions, and briefs adequately present the positions of the parties. In addition, the request was untimely. See Sec. 102.46(i) of the Board's Rules and Regulations.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondents filed numerous exceptions to the judge's factual findings, most of which do not have merit; however, we correct a few inadvertent factual errors which do not affect the decisions. The Union was not party to successive collective-bargaining agreements with a multiemployer association known as DDOM; rather, the Union was party to successive bargaining agreements with various multiemployer associations which merged in 1987 to form DDOM. Further, the record shows that Powers Distributing Company first became aware of a problem with empty can credits in 1991, not 1992 as the decision states. The record also shows that rather than counting all bags of returned cans, Powers counted only randomly selected or specially identified bags. Finally,

(continued...)

1. We agree with the judge, for the reasons he stated, that the Respondent Companies violated Section 8(a)(5) and (1) by engaging in joint bargaining without the Union's knowledge or consent. Despite the Companies' protestations that they were, instead, engaged in lawful coordinated bargaining—i.e., each employer making its own entirely independent decision on contract terms, although coordinating its negotiations with the other employers—the credited evidence speaks otherwise, as the following summary demonstrates.

The Respondent Companies, six beer distributors who were formerly members of various multiemployer associations that had had successive contracts with the Union, resigned from a multiemployer association to which they had all belonged and, in 1990, entered into a "mutual aid pact" in which they agreed to 22 "minimum

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(continued . . .)

the Respondents excepted to the finding that on May 22, 1990, Respondent Negotiator Long did not respond to Union Negotiator Knox's request for the mutual aid pact. The record shows that the pact was not specifically mentioned at that session, although the Union questioned whether the parties were not, in fact, engaged in joint bargaining.

We find, contrary to the judge, that the Respondents were competitors under the circumstances of this case, where, even though they had defined brands that did not overlap, the companies competed with each other for shelf space. However, the Respondents' status as competitors does not affect the result in this case.

[3] The General Counsel has excepted to the judge's inadvertent failure to include in the Order and notices make-whole language from the remedy section of his Decision and Order. We find merit in that exception and modify the Order. In addition, we modify the unit description in sec. IV and Appendix C to include two omitted classifications and modify Appendix G to include "like or related" language which was inadvertently omitted.

We shall further modify the judge's recommended Order and the appendices in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

objectives . . . for a new Collective Bargaining Agreement." These objectives included, in addition to economic terms, such noneconomic terms as a management-rights clause, a more restrictive grievance procedure, and a zipper clause. The agreement further provided that the objectives could be changed only by a majority vote of the six signatories to the pact, and that any distributor who breached the agreement, negotiated directly with the Union concerning any of the 22 objectives, or agreed to settle on any "terms and conditions in excess of those listed" would be liable for a "penalty fee" of $400,000 to each of the other distributors. The chief spokesman for the Companies, Fred Long, made it clear from the start of negotiations that the Companies intended all the agreements to be "basically identical"; but, the terms of the mutual aid pact—most notably each Company's potential liability of $2 million to the other Companies for agreeing to terms "in excess" of those contained in the objectives—was not disclosed to the Union until the hearing in this case.

Because deviation from the objectives could be achieved only by a majority vote, three Companies could veto another company's contract, and enforce this veto with the agreed-on financial penalty. By entering into the pact, therefore, each Company effectively lost its freedom to make the ultimate decision regarding provisions of its contract with the Union, ceding that decision to the other Companies as a group. In keeping with that agreement, as the judge found, the Companies did bargain in effect as a single group up to and including their implementation of final offers.

The conduct is unlawful under Board precedent that—although developed mainly under Section 8(b)(3) of the Act, which requires unions to bargain in good faith—applies equally to the conduct of employers, which have a good-faith bargaining obligation under Section 8(a)(5). It is a violation of the statutory bargaining obligation for either a union or an employer to insist to impasse on a nonmandatory subject of bargaining, i.e., a subject that does not concern the terms and

conditions of employment in the bargaining unit to which the employer's recognitional obligation extends. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Change in the scope of a bargaining unit is a nonmandatory subject. When either employers or unions which have in the past bargained in separate units begin, without the consent of the other side, to bargain jointly as if bargaining for a single contract, they are engaging in unlawful insistence on a nonmandatory subject. "Neither an employer nor a union is free to insist, as a condition of reaching an agreement in one unit, that the negotiations also include other units, or that the terms negotiated in the first unit be extended to other units." *Utility Workers Local 111 (Ohio Power)*, 203 NLRB 230, 238 (1973), enfd. 490 F.2d 1383 (6th Cir. 1974). Thus, the Board held unlawful the pooled ratification procedure at issue in *Paperworkers Local 620 (International Paper)*, 309 NLRB 44, 45 (1992), because a system allowing parties outside a given bargaining unit effectively to veto an agreement on a contract for that unit is a system "that allows for refusal to sign an agreement on the basis of a nonmandatory subject of bargaining," i.e., a subject that does not "concern the wages, hours, and working conditions of the unit covered by that agreement."

In the present case, as noted above, the secret pact of the Respondent Companies created a system, enforced by substantial financial penalties, by which the votes of the Companies outside a particular bargaining unit could block agreement on a contract by the bargaining parties in that unit. Even though the views of the other Companies expressed in those votes concern terms and conditions of employment, they are extraneous considerations so far as the bargaining unit whose agreement the outsiders seek to veto is concerned. Because the pact was secretly carried out, it was effectively imposed on the Union without its consent and therefore constituted unlawful insistence.

As we agree with the judge that the bargaining was unlawful from its inception, and that, therefore, all subsequent unilateral implementations of the Respondents' offers were unlawful and must be rescinded, we do not reach the issue of whether the Respondents' implemented proposals on casual employees were unlawful under *McClatchy Newspapers*, 299 NLRB 1045 (1990), remanded 964 F.2d 1153 (D.C. Cir. 1992), decision on remand 321 NLRB 1386 (1996), and *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991), cert. denied 504 U.S. 955 (1992). With respect to probationary employees, we agree with the judge's basis for finding no violation, and thus we need not pass on the cases cited above.

2. The Respondents have excepted to the judge's rejection of their contention that the allegations of unlawful joint bargaining were time-barred under Section 10(b) of the Act, and, in particular, to his holding that those allegations were permissible, because they were closely related to a timely filed charge within the meaning of *Redd-I*, 290 NLRB 1115 (1988). In applying the doctrine of *Redd-I*, the judge found inter alia that the "joint bargaining" complaint amendment was identical to a portion of the charge that had been dismissed. Under *Redd-I*, however, the issue is whether an amendment is closely related to a viable portion of a charge, not to a dismissed or withdrawn portion. Id. at 1116. In the instant case, we find that the joint bargaining allegation was closely related to the charge allegation of unilateral implementation before impasse (which became a part of the complaint). Applying the *Redd-I* factors, we note: the joint bargaining allegation is of the same class of violation in that it concerns negotiating conduct governed by Section 8(a)(5) of the Act; it involves the same factual setting and sequence of events, in that all the theories call for analysis of the entire course of bargaining; and the Respondents raised virtually the same defenses.

In any event, as the judge found, the amendment was appropriate for the additional reason that the Respondents' fraudulent concealment of the existence of the pact tolled the 10(b) period.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that:

I. Respondents Don Lee Distributor, Inc. (Warren), Warren, Michigan; Don Lee Distributor, Inc. (Dearborn), Dearborn, Michigan; Powers Distributing Company, Inc., Warren, Michigan; Eastown Distributors, Co., Highland Park, Michigan; Hubert Distributors, Inc., Pontiac, Michigan; and Oak Distributing Co., Inc., Waterford, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bargaining in bad faith with Local 1038, International Brotherhood of Teamsters, AFL-CIO by agreeing with other employers to form a multiemployer association or bargaining coalition and bargaining with the Union while concealing the agreement and without securing the consent of the Union to engage in such bargaining.

(b) Unilaterally implementing offers made during collective-bargaining negotiations with the Union without first having bargained in good faith to impasse with respect to terms and conditions of employment that they implemented.

(c) Unilaterally implementing wage rates that are inconsistent with offers they made during collective-bargaining negotiations.

(d) With the exception of Hubert, unilaterally determining the wages to be paid to their casual employees, without bargaining with the Union.

(e) In any like or related manner interfering with, restraining, or coercing their employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the entire February 7, 1991 implementation, including, but not limited to, the implementation of the new casual employee classification and new casual employee classification and new probationary employee clause, and the entire April 15, 1991 implementation, including, but not limited to, the implementation of the elimination or reductions of hourly wage rates and holiday and vacation pay, and restore all terms and conditions of employment to the status quo before the unilateral changes, to the extent that such were detrimental to their employees, with interest computed in the manner set forth in the remedy section of the judge's decision.

(b) Make all unit employees whole for any loss of wages and benefits they may have suffered as a result of the unlawful changes.

(c) Make whole employees for the implementation of a wage inconsistent with the Respondents' last offers to the extent that the employees were harmed thereby, with interest.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, Don Lee Warren shall post at its facilities in Warren, Michigan, copies of the attached notice marked "Appendix A"; Don

Lee Dearborn shall post at its facilities in Dearborn, Michigan, copies of the attached notice marked "Appendix B"; Powers shall post at its facilities in Warren, Michigan, copies of the attached notice marked "Appendix C"; Eastown shall post at its facilities in Highland Park, Michigan, copies of the attached notice marked "Appendix D"; Hubert shall post at its facilities in Pontiac, Michigan, copies of the attached notice marked "Appendix E"; Oak shall post at its facilities in Waterford, Michigan, copies of the attached notice marked "Appendix F."[4] Copies of the notices, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, any of the Respondents have gone out of business or closed a facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the appropriate notice to all current employees and former employees employed by the Respondents at any time since December 14, 1990.

(f) Within 21 days after service by the Region, file with the Regional Director sworn certifications of responsible officials on forms provided by the Region attesting to the steps that the Respondents have taken to comply.

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

II. Respondent Don Lees Distributor, Inc. (Warren), Warren, Michigan, its officers, agents, successors, and assigns, shall

Take the following affirmative action necessary to effectuate the policies of the Act.

On request, bargain collectively and in good faith with the Union concerning the rates of pay, hours of employment, and other terms and conditions of employment in the following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Don Lee Distributor, Inc. (Warren), at its Warren, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

III. Respondent Don Lee Distributor, Inc. (Dearborn). Dearborn, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally assigning work to its casual employees at times that are inconsistent with offers made during collective-bargaining negotiations.

(b) Unilaterally changing its route-bidding procedures and route assignments of its employees without bargaining with the Union.

(c) Removing protected literature from an employee bulletin board, thereby disparately enforcing its rules with respect to the use of its bulletin board.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole those drivers and warehouse employees who were on layoff status at the times when it unilaterally assigned casual employees to perform warehouse and driving work and at times other than those provided in its last, best, and final offer, in the manner set forth in the remedy section of the judge's decision.

(b) Within 14 days from the date of this Order, offer those of its regular employees whom it terminated when their layoff status was extended for more than 6 months by reason of its employment of casual employees immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(d) Rescind its route-bidding procedures and route assignments and reinstate its route bidding procedures and route assignments as they existed prior to November 18, 1991.

(e) Make whole those employees who were detrimentally affected by its unilateral change of their mute assignments and route-bidding procedures in the manner set forth in the remedy section of the judge's decision.

(f) On request, bargain collectively and in good faith with the Union concerning the rates of pay, hours of employment and other terms and conditions of employment in the following unit which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Don Lee Distributor, Inc. (Dearborn), at its Dearborn, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

IV. Respondent Powers Distributing Company, Inc., Warren, Michigan., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees that it would commence disciplining them for their failure to comply with its "Empty Pick-Up" language of its Standard Operating Procedures.

(b) Disciplining its employees for their alleged failure to comply with its "Empty Pick-Up" language of its Standard Operating Procedures.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind any warnings or other discipline issued to its employees Butch Callahan, Daniel Pickett, Thomas Jackson, Lynn DeMay, David Moody, Robert Golding, Greg Sheldon, Mike Thornberry, John Oestrick, Randy Spicer, Bud Goike, Chad Gardner, and Jim Marks for their alleged failure to comply with its "Empty Pick-Up" language of its Standard Operating Procedures, remove any reference to such discipline from all its files, and, within 3 days thereafter, notify them in writing that this has been done and that the discipline will not be used against them in any way.

(b) On request, bargain collectively and in good faith with the Union concerning the rates of pay, hours of employment, and other terms and conditions of employment

in the following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Powers Distributing Company, Inc., at its Warren, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

V. Respondent Eastown Distributors, Co., Highland Park, Michigan, its officers, agents, successors, and assigns., shall

Take the following affirmative action necessary to effectuate the policies of the Act.

On request, bargain collectively and in good faith with the Union concerning the rates of pay, hours of employment, and other terms and conditions of employment in the following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, and hand loaders, employed by Eastown Distributors, Co., at its Highland Park, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

VI. Respondent Hubert Distributors, Inc., Pontiac, Michigan, its officers, agents, successors, and assigns, shall

Take the following affirmative action necessary to effectuate the policies of the Act.

On request, bargain collectively and in good faith with the Union concerning the rates of pay, hours of employment, and other terms and conditions of employment in the

following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Hubert Distributors, Inc., at its Pontiac, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

VII. Respondent Oak Distributing Co., Inc., Waterford, Michigan, its officers, agents, successors, and assigns, shall

Take the following affirmative action necessary to effectuate the policies of the Act.

On request, bargain collectively and in good faith with the Union concerning the rates of pay, hours of employment, and other terms and conditions of employment in the following unit. which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time driver-salesmen, helpers, warehouse employees. forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Oak Distributing Co., Inc., at its Waterford, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

VIII. Respondent West Coast. Los Gatos, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening a representative of Local 1038, International Brotherhood of Teamsters, AFL-CIO that two of its clients would kill the representative if they thought that they could get away with it.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, West Coast shall post at its facilities in Los Gatos, California, copies of the attached notice marked "Appendix G."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of this notice to all current employees and former employees employed by the Respondent at any time since December 14, 1990.

(b) Within 14 days after service by the Region, forward a sufficient number of signed copies of the notice to the Regional Director for Region 7 for posting by the Union at its office and meeting halls in places where notices to employees am customarily posted, should the Union agree to do so.

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

WEST COAST INDUSTRIAL RELATIONS ASSOCIATION, INC.

Tinamarie Pappas, Esq. and *Mary Beth Foy, Esq.*, for the General Counsel.

Patrick W. Jordan, Esq. (Keck, Mahin & Cate; Julie Collins Nelson, Esq., and *Steven N. Yang, Esq.*, on the brief), of San Francisco, California, for Respondents Don Lee (Warren), Don Lee (Dearborn), Powers, Eastown, and Oak.

Fred R. Long, Esq. and *Kevin L. Dorhout, Esq.*, of Los Gatos, California, for Respondents Hubert and West Coast.

Samuel C. McKnight, Esq. and *Steve Wolock, Esq. (Klimist, McKnight, Sale, McClow & Canzano, P.C.)*, of Southfield, Michigan, for Charging Party.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. The complaint in this lengthy unfair labor practice proceeding alleges that the Company Respondents did not reach a lawful impasse in their negotiations with the Charging Party Union and were not entitled to implement the provisions of their last, best, and final offers, made on September 13, 1990. The complaint also alleges other violations of the National Labor Relations Act (the Act). Respondents denied that they violated the Act in any manner.[1]

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[1] The relevant docket entries are as follows: Local 1038, International Brotherhood of Teamsters, AFL-CIO filed charges

(continued...)

Jurisdiction is conceded. Don Lee Distributor, Inc. (Warren) (Don Lee Warren), Don Lee Distributor, Inc. (Dearborn) (Don Lee Dearborn), Powers Distributing Company, Inc. (Powers), Eastown Distributors, Co. (Eastown), Hubert Distributors, Inc. (Hubert), and Oak Distributing Co., Inc. (Oak; all the Company Respondents being referred to as Respondents or Companies) are Michigan corporations and are engaged in the wholesale distribution of beer at their various facilities located in the metropolitan Detroit area. During the year ended October 30, 1992, they severally had gross revenues in excess of $500,000 and purchased beer products valued in excess of $50,000 for their various Detroit area locations directly from sellers located outside Michigan. I conclude, as they admit, that each of them has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also

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(continued . . .)

against West Coast in Case 7-CA-31302 on December 14, 1990, and a complaint issued on January 31, 1991. The Union filed charges on April 3, 1991, against Don Lee (Warren) in Case 7-CA-31719(2), against Don Lee (Dearborn) in Case 7-CA-31719(3), against Powers in Case 7-CA-31719(4), against Eastown in Case 7-CA-31719(5), against Hubert in Case 7-CA-31719(6), and against Oak in Case 7-CA-31719(7). Amended charges in Cases 7-CA-31719(2)-7 were filed by the Union on April 26, 1991. The Union filed its charge in Case 7-CA-32164(1) against Don Lee (Dearborn) and Don Lee (Warren) on August 2, 1991. The Union filed its charge in Case 7-CA-32896 against Don Lee (Dearborn) on February 10, 1992, and amended it on February 11 and March 16. The Union filed another charge to Case 7-CA-32986 against Don Lee (Dearborn) on March 2, and amended it on March 16 and 19. The charge in Case 7-CA-33649 against Powers was filed by the Union on August 26, 1992, and the charge in Case 7-CA-33707 against Don Lee (Warren) and Don Lee (Dearborn) was filed an September 10, 1992. The first complaint issued on July 29, 1991, and subsequent complaints issued on September 30, April 28, August 28, and October 30, 1992. The hearing was held in Detroit, Michigan, on about 60 days between November 16, 1992, and October 26, 1993.

conclude, as Respondents admit, that Local 1038, International Brotherhood of Teamsters. AFL-CIO (the Local being referred to as the Union and its international being referred to as the International or Teamsters), is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act. Finally, I conclude that West Coast Industrial Relations Association, Inc. (West Coast), a California corporation, has served as labor consultant to, and the representative of, Respondents, acting on their behalf within the meaning of Section 2(13) of the Act. During the year ended December 31, 1990, West Coast performed services valued in excess of $50,000, of which services valued in excess of $50,000 were performed in and for various enterprises located in States other than California. I conclude that it, too, has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The following employees of Respondents constitute units appropriate for the purposes of collective bargaining, within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Don Lee Distributor, Inc. (Warren), at its Warren, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.
>
> All full-time and regular part-time driver-salesmen. helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees, and breaker pile employees employed by Don Lee Distributor, Inc. (Dearborn), at its Dearborn, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees, and breaker pile employees employed by Powers Distributing Company, Inc. at its Warren, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, and hand loaders employed by Eastown Distributors, Co., at its Highland Park, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Hubert Distributors, Inc., at its Pontiac, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

All full-time and regular part-time driver-salesmen, helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Oak Distributing Co., Inc., at its Waterford, Michigan, facility; but excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

For Many Years the Union has been the exclusive bargaining representative within the meaning of Section 9(a) of the Act of Respondents' employees described above, having been party to successive collective-bargaining agreements covering the units with a multiemployer association, the Downriver, Detroit, Oakland. Macomb Wholesalers Association, Inc. (DDOM), of which the Companies were members. I conclude, as Respondents admit, that the Union, by virtue of Section 9(a) of the Act,

has been, and is now, the exclusive representative of the employees in the units described above for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment. and other terms and conditions of employment.

The most recent DDOM contract had a term of three years and expired on May 1, 1990. The Companies were unhappy with that contract. There were certain cutbacks and alterations to the contract that they had wanted, but they were outvoted by the other DDOM members; and so they determined to resign from the association and negotiate the changes that they wanted. Enter Fred Long, the chief executive officer of West Coast. West Coast had wide experience representing employers in the beer distributing industry, and Long has persuaded many employers that the wages and benefits provided by Teamsters contracts were too high and that his negotiating skills would eliminate many of the benefits that those contracts contained and cut costs, and that the numerous and broad services he provided would successfully counter any economic or other action that the Teamsters would take.

Representatives of several of the Companies met with Long in Chicago in November 1989, and he eventually persuaded them and the other Respondents that he and West Coast would afford them the best services for negotiating on their behalf. On January 18, 1990, they retained him in a document they called a "mutual aid pact." The agreement stated, in relevant part:

> WHEREAS, each of [Respondents] is a Distributor of beverages and in Employer of employees represented by [the Union] which has a collective bargaining agreement with each Distributor and;
>
> WHEREAS, each Distributor is desirous of correcting and/or improving the language and economics of its respective collective bargaining Agreement with said Union to reflect more nearly

market supply and demand conditions, to correct unreasonable health & welfare and pension costs for the benefits received and to negotiate improvements in operational efficiencies, and;

WHEREAS, the Union has had a history of striking or bringing pressure to bear on certain Distributors or certain groups of Distributors to force bad Agreements on all Distributors that are fraught with operational inefficiencies, featherbedding practices, excessive costs and practices which restrict and hamper Distributors rights, and;

WHEREAS, each Distributor can offset the Union's bargaining power by entering into a mutual aid agreement and coordinated bargaining effort.

THEREFORE, IT IS AGREED AS FOLLOWS:

1. Each Distributor shall enter into its own Agreement with the Union. Nothing contained herein shall be construed to reflect a multi-employer association nor create a multi-employer unit. This document reflects a coordinated bargaining effort among individual and independent Distributors.

Respondents agreed to share the costs and expenses of the services of "Long and his associates who shall represent the [Respondents'] bargaining efforts with the Union," which services included the preparation and conduct of negotiations. They also agreed to share the costs of any strike called against one, some. or all of them for 90 days and "to the establishment of . . . minimum objectives . . . for a new Collective Bargaining Agreement which can only be changed by [their] majority vote," as follows:

1. Eliminate eight (8) hour minimum/maximum day. [The DDOM agreement provided that: "Five (5) consecutive work days, or forty (40) work hours, shall constitute a normal full time week's work. Nothing contained herein is construed to provide a guaranteed

work period, except that eight (8) consecutive work hours, other than the lunch period, shall constitute the minimum normal day's work for a driver and a full time warehouseman."]

2. Remove load limit. [The DDOM agreement provided that employees could deliver only a certain number of cases each week. The number varied, depending on the time of the year, with the most deliveries permitted from May 1 to September 15, the peak season for the consumption of beer.]

3. Overtime after forty (40) hours per week.

4. Management rights clause. [The DDOM agreement contained no such clause.]

5. More restrictive grievance procedure.

6. Single pay holidays. [The DDOM agreement provided for 12 paid holidays, of which 8 were paid double. Thus, the employees were paid for 20 days.]

7. Simplified vacation language.

8. Four (4) weeks maximum vacation, red circle everyone over. [The DDOM agreement provided for five weeks of vacation, with all employees who received more being red-circled.]

9. Cooler and basement deliveries required. [Many of the beer retailers placed their cases in coolers and basements. The DDOM agreement provided: "Delivery Drivers and Helpers shall not be required to place bottled or canned beer in customers ice boxes or coolers or to remove empties therefrom; and Delivery Drivers or Helpers shall not climb ladders or other objects in or on customer's premises to deliver beer or pick up empty cases. . . . Basement deliveries, and/or deliveries above the first floor, and the removal of empties from basements and/or other than the first floor, will not be permitted."

10. Reduction in wages.

11. Refined benefit pension plan--percentage of earnings.

12. Insurance revisions.

13. No curfew. [The DDOM agreement permitted drivers to leave the warehouse no earlier than 7 a.m. for drivers assigned to an eight-hour day and 6:30 a.m. for drivers assigned to a ten-hour day. Most 8-hour employees had to return to the warehouse by 5 p.m. and 10-hour employees by 5:30 p.m.]

14. Bulk deliveries. [There was no provision for bulk deliveries in the DDOM agreement. The Union's president and principal negotiator, Robert Knox, described them as specially designated routes, on which the drivers would travel only to large volume stops.]

15. Zipper clause. [The DDOM agreement contained no zipper clause.]

16. Empty pick up rate. [The drivers were required to pick up cases of empty bottles and bags of empty cans.]

17. Longer probation period.

18. No restrictions on number of part-time employees.

19. Reduction on commission when helper is used.

20. More flexibility with reclamation duties. [Michigan law required the collection and processing of empty beverage containers.]

21. Common expiration date.

22. Minimum three year contract.

The agreement concluded with the following paragraph 8:

> In the event any Distributor is in breach of this Agreement or negotiates directly with the Union (or any other Union or person or group who allegedly is representing this Union's Interest) or agrees to settle on terms and conditions in excess of those listed . . . above [the 22 items], that Distributor, in addition to any other damages for breach of this Agreement that may occur in any enforcement law suit brought by any of the other Distributions [sic] shall, in addition, pay to each of the other Distributors a penalty fee of $400,000 to each.

Neither the Union nor the General Counsel had seen the pact until Respondents produced it in compliance with a subpoena issued early in this proceeding. At that time, the status of the complaint's principal allegations was as follows: The original charges in Cases 7-CA-31719(2)-(7) alleged that Respondents had violated Section 8(a)(5) "in the six months prior to the filing of [the] charge . . . by bargaining in bad faith and by, on or about February 4, 1991, unilaterally implementing terms and conditions of employment prior to reaching a bona fide impasse." Respondents implemented almost all of their final offers on February 7, 1991, except for various economic proposals, including wages and the reduction of holiday and vacation pay.[2] They implemented those on April 15, and the Union amended its charges to add those additional unilateral implementations. The Regional Director found probable cause to believe that Respondents bargained in bad faith by its implementations in February, but only with respect to two of its proposals, the longer probationary period and the employment of persons under a new classification of casuals, reserving to Respondents "virtually total control" over their terms and conditions of employment, even though casuals could constitute up to 50

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[2] Respondents' implementations are contained in Thomas' letter, dated January 10, 1991. G.C. Exh. 122.

percent of the unit. This portion of the complaint was based solely on *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991), cert. denied 504 U.S. 955 (1992). In addition, the Regional Director found that Respondents violated Section 8(a)(5) by implementing those proposals and all the April 15 economic changes without having reached a valid impasse. The first complaint was based on those theories alone.

The complaint was not based on the additional theory of the Union's unfair labor practice charges, that Respondents engaged in multiemployer bargaining without the Union's consent. The Union appealed the Regional Director's refusal to issue a complaint on that ground, but the General Counsel's Office of Appeals sustained the decision because, as stated in its letter of July 28, 1992: "[T]he evidence was insufficient to meet the burden of establishing that [Respondents] had entered into an agreement to restrict separate agreements by the parties or that [Respondents] had attempted to combine all the bargaining units into one unit." By so finding, the Office of Appeals must have agreed with Long's letter, dated July 6, 1992, defending the Regional Director's decision:

> Union alleges Employers engaged in illegal coalition bargaining. Employers, at the very first bargaining session with union offered in writing to meet on either a coordinated basis or individual Employer basis with union. Union's initial written proposal to Employers in March 1990 was identical for all Employers. All prior agreements between union and Employer [sic] were identical in terms and conditions for all Employers. Coordinated bargaining lasted from March to June 1990 whereupon union insisted all further meetings be by individual Employer only. Employers conceded to union demand although they told union its actions were designed to stall and prolong negotiations. Union alleges Employer [sic] had some kind of agreement

making bargaining illegal. Although union could only speculate, Employers had only one agreement amongst them and that was a mutual aid pact sharing costs to pay [for?] negotiations, security protection if a strike occurred and related [sic].[3] None of the parties entered into any agreement that would restrict their bargaining. However, all of them would periodically agree on common positions they wanted to take during negotiations so they couldn't be whipsawed by the union.

After Respondents produced the mutual aid pact at the beginning of the hearing, the General Counsel moved to amend the complaint to allege that not just the unilateral implementations complained of in the original complaint were invalid, but all the new terms were, because the pact, which was concealed from the Union, was actually an agreement forming "a de facto multi-employer association and/or bargaining coalition" and that from March 27, 1990, the first negotiating session, Respondents bargained illegally as a multiemployer association or engaged in coalition bargaining, without the Union's consent. Thus, no valid impasse was reached. Furthermore, Respondents' multiemployer or coalition bargaining was "bad faith and/or surface bargaining," but only from October 3, 1990, which was 6 months prior to the filing of the charge. I granted the General Counsel's motion to amend. Respondents contend that the amendment was untimely, barred by the Act's Section 10(b) 6-month statute of limitations. I disagree.

In *Winer Motors*, 265 NLRB 1457 (1982), the Board prohibited the revival, outside of the applicable 6-month limitations period, of any allegation contained in a withdrawn charge. In *Ducane Heating Corp.*, 273 NLRB

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[3] This typographical omission undoubtedly refers to services for which West Coast's costs were to be shared.

1389 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986), the Board held that the same rule would apply to charges that were dismissed. The Board held, however, in both situations, that a resurrection of a charge outside the applicable limitations period would be permitted if there were "special circumstances in which a respondent fraudulently concealed the operative facts underlying the alleged violation." *Ducane,* supra at 1390.

Redd-I, Inc., 290 NLRB 1115 (1988), involved neither a dismissed nor withdrawn charge. There, the union filed a timely charge alleging that employee Kelley, as well as eight other employees, had been illegally discharged on August 19, 1985. Thereafter, it withdrew that charge, but filed a new charge on January 6, 1986, alleging that the same employees, except Kelley, had been illegally discharged. On March 3, it amended the charge to add seven other employees who were laid off on August 15; and on May 6, it requested that its charge be further amended by adding Kelley. At the hearing 2 days later, the General Counsel moved to amend the complaint to include an allegation concerning Kelley's discharge. The Board permitted the amendment, finding that a distinction must be made between a dismissed or withdrawn charge containing certain allegations sought to be revived and a charge that is still pending. If the allegations are closely related to what was alleged in the existing charge, then the amendment should stand if the otherwise untimely allegations "are of the same class as the violations alleged in the pending timely charge . . . [and] arise from the same factual situation or sequence of events . . . and [if] a respondent would raise the same or similar defenses to both allegations." Id. at 1118; *Fiber Products,* 314 NLRB 1169 (1994).

The original charges in Cases 7-CA-31719(2)-(7) were never dismissed or withdrawn. They are still pending. The amendment encompasses each charge in its entirety, including that portion of which the General Counsel

originally refused to issue a complaint when the Office of Appeals found missing from the Union's proof "an agreement to restrict separate agreements." Now, with the revelation of the pact, the complaint alleges that the pact restricts each Company's right to negotiate directly with the Union or negotiate its own agreement because the pact mandates 22 goals that can be modified only by majority vote of all the Companies. The amendment merely reinstates what the original charges had alleged as bargaining in bad faith. Thus, those allegations not only are closely related to what was alleged in the existing charges but also are identical to that portion about which the General Counsel had refused to issue a complaint. So, too, are all the new allegations which complain that Respondents implemented their entire offers without reaching a valid impasse. Just as the Board permitted Kelley to be added as an alleged disciminatee in *Redd-I,* the new complaint adds all the rest of the February implementations. Obviously, then, the new allegations are of the same class as the violations alleged in the pending timely charges, as *Redd-I* dictates.

In addition, the amendment arises from the same factual setting or sequence of events. An element of reaching a lawful impasse, in determining whether Respondents' other unilateral implementations violated the law, is the parties' good faith. The Board's oft-quoted test is set forth in *Taft Broadcasting Co.,* 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB,* 395 F.2d 622 (D.C. Cit. 1968), as follows:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

To determine whether a legal impasse was created before the implementations that the original complaint sought to remedy, even in the absence of the General Counsel's claim that Respondents were guilty of bad-faith bargaining, the parties would have had to detail all the bargaining sessions preceding the implementations. The parties did that in this proceeding. The amendment changes barely a whit the proof that would have been offered had the amendment not been made. Concededly, a new theory has been added, but the complaint still involved a consideration of all the elements that must be analyzed under *Taft Broadcasting*. The amendment also involves the same Section of the Act.[4] The conduct is thus "similar" and with a "similar object" as *Redd-I* requires. Finally, although Respondents have added some defenses denying that they were bargaining as if they constituted a multiemployer group, almost all of their 12 defenses apply to the original allegations. The only new affirmative defense specifically aimed at the amendment is a claim that, assuming that they engaged in multiemployer bargaining, the Union consented to it. Because there are no facts in support of this defense that Respondents would not have elicited anyway, they presented the same evidence in this proceeding as they would have, had there been no amendment. I thus conclude that all the requirements of *Redd-I* have been met.

In addition. even if the allegations of the unfair labor practice charge were not "closely related" and the charge had been dismissed in its entirety, I would still permit the amendment under *Ducane Heating*. From the very beginning of negotiations, Knox asked for pacts and agreements, but he has received none. Respondents contend that they did not fraudulently conceal the existence of the pact, but that is not accurate. At the first negotiating session

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[4] But see *Fiber Products*, supra at fn. 3.

on March 27, 1990, when Knox asked whether there was a mutual assistance pact. Long said only that Respondents have an "understanding."[5] When Knox pursued his request, Long said that he was going to ask his clients not to respond because it was not a relevant subject; so Knox could take his answer as "no response." At the second session on April 18, Knox again asked whether the Respondents formed a group or a coalition, and Long responded that that was "none of [Knox]'s business" and refused to answer. On May 22, Long again did not respond to Knox's request for the pact. The subject of the existence of a pact was raised again on June 27, after Chris Thomas, an associate of Long, had replaced Long as Respondents' principal negotiator, but Thomas did not respond to Knox's request for the document.

On August 8, Knox asked for all documents showing the relationship between West Coast and Respondents. Thomas then stated that they were confidential. On September 20, Knox asked about any written or oral agreement between Respondents about negotiations. Both Bob Gustafson, vice president of marketing of Hubert, and Van Goethem denied the existence of the pact. On July 12, 1991, 3 months after the Union filed its charges in Cases 7-CA-31719(2)-(7), Steve Wolock, a union attorney, demanded any mutual aid agreement "or anything like that," because the Union had to know whether there were "any restrictions or any limitations among the parties." For the first time, Thomas admitted that there was such an agreement but said that he would have to see the relevancy of it to the Union and then asked, if he showed it, whether the Union would bargain with Respondents "as a group." Then, Thomas wrote to Wolock saying that the document was written by Long and was

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[5] In a unit clarification proceeding held several weeks before, Don Klopcic Jr., Don Lee Dearborn's president, and Bob Van Goethem, general manager of Don Lee Warren and comptroller of Don Lee Dearborn, denied that there was any agreement with Long.

protected by an attorney-client privilege. Respondents would be willing to show it if Wolock showed its relevance and supplied "case authority" where the relevance has been upheld by the Board. Wolock supplied the relevance, but Respondents complain in their brief that the Union supplied no legal authority.

Thus, for 16 months, until July 12, 1991, and even as late as July 6, 1992, when Long wrote to the Office of Appeals, Respondents concealed the existence of the pact. Neither Long nor Thomas was truthful and candid about its existence and, without the subpoena issued in this proceeding, it is likely that no one would be aware of its contents even now. I do not agree with Respondents' contention that, if the Union wanted the pact so badly, it should have brought some legal proceeding, such as filing an unfair labor practice charge, to get it. First, I have substantial doubt that the Union would even be entitled to complain of Long's refusal to produce a "mutual aid pact." Respondents do not assert that a mutual aid pact has any relevance to a labor organization in the ordinary course of bargaining, and I have found no legal authority for this proposition, either. Second, Board law should not fault the Union when its failure to pursue a remedy is caused by Respondents' refusal to comply with the Union's requests, particularly when Klopcic Jr. and Van Goethem lied about its existence, Long fraudulently concealed the pact's contents and, as shown below, the Union repeatedly questioned the bona fides of the Companies' asserted "coordinated bargaining."

Finally, even if Respondents had somehow hinted at the existence of the pact in such a way that the Union should have divined its existence, Long and his cohorts certainly never gave any clue about its contents. The Union never knew, nor did the General Counsel. No one knew that the pact prohibited each of Respondents from bargaining directly with the Union or agreeing to terms and conditions which

did not meet the minimums. No one knew that, if one Company strayed from what the others wanted, it subjected itself to damages of at least $1,600,000. [Don Lee Dearborn and Don Lee Warren appear to be treated as a single employer for the purposes of the pact.] And no one knew that Long's letter to the Office of Appeals misstated that the pact did not "restrict" Respondents' bargaining and that the pact related only to "sharing costs to pay [for?] negotiations, security protection if a strike occurred and related [sic].[6] In addition, Long misstated to the Union the contents of the pact, at the first bargaining session, by denying that there would be a penalty if one Company bargained directly with the Union, as follows:

> Knox: Is there a mutual assistance aid pact?
>
> Long: We have an understanding that our positions throughout the negotiations [are the] same and except with some minor exceptions are the same with regard to any specific agreements by and between them. In terms of how they intend to prepare themselves, if you will, from a pact funding point of view, I don't know.
>
> Knox: Do they have the right at any point to say: okay, we want to go off on our own?
>
> Long: Sure.

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[6] In so concluding, I find little difference between Long's misstatement of the contents of the mutual aid pact and Respondents' denial that they were engaged in multiemployer bargaining. Both would be considered "fraudulent concealments" under *District Lodge 64 Machinists v. NLRB.* 949 F.2d 441 (D.C. Cir. 1991), remanding *Brown & Sharpe Mfg. Co.,* 299 NLRB 586 (1990); on remand 312 NLRB 444 (1993). Perhaps the time is ripe for the Board to reconsider its past reluctance to consider denials as constituting sufficient acts of concealment that might extend the 10(b) period. After all, the Union filed a timely charge, and it was not at fault when Respondents acted as they did.

Knox: Away from you?

Long: Sure.

Knox: Without penalty?

Long: If they wish to go with someone else as far as I'm concerned they can go do it.

The agreement provides that a Company cannot bargain directly with the Union. If it did, it would subject itself to the penalty set forth in paragraph 8.

Respondents contend that I may not consider evidence of events prior to October 3, 1990 (6 months before April 3, 1991, the date of the charges), because of Section 10(b). Each charge complaining of the first implementation, which occurred on February 7, 1991, was timely filed, less than 2 months later. Each amendment was also timely filed, within 2 weeks of the second implementation. The portion of each charge alleging bad-faith bargaining was limited to the 6 months before the filing. The General Counsel concedes that I can go back no further than October 3, 1990, because the charge was not amended; but that is too restrictive. In *Redd-I*, the Board permitted consideration of Kelley's layoff, despite the fact that no amended charge had been filed. Furthermore, under the Ducane theory, because the mutual aid pact was fraudulently concealed, it is appropriate to consider all evidence occurring within 6 months of the date that Respondents first concealed its contents. It is more appropriate to adopt that earlier date. Otherwise, Respondents benefit from their refusal to reveal to the Union (or anyone else, for that matter, including the Office of Appeals) the contents of the pact and from their misrepresentation of the same. In addition, the Union should not suffer merely because it suspects a violation and files a charge that it cannot prove because of Respondents' concealment and misrepresentation. Instead, had it not filed a charge and then discovered the existence of the pact, it would have been able to file a new charge and introduce any

evidence, without regard to the 6-month statute of limitations. *Fiber Products*, 314 NLRB 1169 at fn. 2. Accordingly, I have considered all the evidence in support of the complaint, without regard to date. All the evidence prior to October 3, 1990, is clearly appropriate as background, in any event, just as in any bad-faith bargaining case.

Respondents additionally contend that paragraph 8 of the pact does not mean what it says, that it does not prohibit all Companies from individually bargaining with the Union settling on term not agreed upon by the others at any time. Rather, their intent was to prohibit that conduct only in the event of a strike. I ruled at the hearing that Respondents had no right to rely on parol evidence to prove that "intent," because paragraph 8 was unambiguous, but I gave them leave to contend in their briefs that I was incorrect. I am not persuaded by their arguments.

The ambiguity that they rely on results from paragraph 1, quoted above at page 5, which provides that Respondents are engaged in coordinated bargaining and that "nothing contained herein shall be construed to reflect a multi-employer association nor create a multi-employer unit" and paragraph 8, which states that any Company that does not bargain with the others or negotiates with the Union more favorable terms than the minimums set forth in the pact is subject to damages. But the inconsistency does not create an ambiguity. There are not two or more possible meanings contained in paragraph 8, and there is no inconsistency in the agreement. Rather, the first paragraph contains merely a self-serving statement regarding the manner that Respondents hoped that their agreement would be legally interpreted, while paragraph 8 imposes on Respondents specific restrictions on their ability to negotiate separately. Respondents' attempt to insert into that paragraph the words "only in the event of a strike" would limit the occasions when it becomes effective. By so doing, the insertion, rather than explaining or clarifying the agreement's intent, "would

instead invalidate and nullify the written agreement." *Beech & Rich, Inc.*, 300 NLRB 882 (1990); *W. J. Holloway & Son*, 307 NLRB 487 (1992). Compare *Operating Engineers Local 3 (Joy Engineering)*, 313 NLRB 25 fn. 2 (1993).

Respondents contend that neither the General Counsel nor the Union may object to Respondents' proffer of the intent of the pact because the parol evidence rule is binding only on those persons who are parties to the document. But this is too broad a statement of the rule. As stated in 3 Corbin, Contracts, Sec. 596 (rev. ed. 1960):

> The question has been raised whether the "parol evidence rule" is applicable in favor of or against a third party who was not a party to the written integration. The answer is definitely in the affirmative if the rule is correctly stated and understood. If two parties have by a written complete integration discharged and nullified antecedent negotiations between them, they are so discharged and nullified without regard to whoever may be asserting or denying the fact.
>
> . . . .
>
> There are numerous cases laying down the contrary rule to the effect that parol evidence that might be inadmissible as between the two parties to a written contract is admissible when offered for or against a third party. The actual decision in these cases can usually be sustained on the ground that the evidence tended to show that the integration was not complete and should have been heard and weighed even as between the parties to the writing. [Fns. omitted.]

Professor Wigmore also criticizes the phrasing of this rule, contending that: "This form of statement suffices in most instances to reach correct results; but it is not sound on principle." 9 Wigmore, *Evidence § 2446* (Chadbourn rev. 1981). As he explains:

> The theory of the rule is that the parties have determined that a particular document shall be made the sole embodiment of their legal act for certain legal purposes. . . . Hence. so far as that effect and those purposes are concerned, they must be found in that writing and nowhere else, no matter who may desire to avail himself of it. But so far as other effects and purposes are concerned, the writing his not superseded their other conduct, nor other persons' conduct, and it still may be resorted to for any other purpose for which it is material, either by other persons or by themselves.
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> . . . .
>
> [After distinguishing a number of decisions] The truth seems to be, then, that the rule will still apply to exclude extrinsic utterances, even as against other parties, provided it is sought to use those utterances *for the very purpose for which the writing has superseded them as the legal act.* [Emphasis added.]
>
> Nevertheless, owing to the inaccurate phrasing of the doctrine as commonly laid down that the rule does not apply to others than the parties to the document the precedents are often arbitrary and confused, and cannot be reconciled by any general distinctions. [Fn. omitted.]

Accord: *Commissioner of Internal Revenue v. Dwight's Estate*, 205 F.2d 298, 301 (2d Cir. 1953), and cases cited therein. Even the decisions relied on by Respondents, while expressing the rule criticized by Corbin and Wigmore, are otherwise distinguishable. In *Great West Casualty Co. v. Truck Insurance Exchange,* 358 F.2d 883 (10th Cir. 1966), while noting that the parol evidence rule is "ordinarily" applied to issues between the parties to the contract and not to third parties, the court found that a stranger to the contract could use parol evidence because the insurance contract in question was uncertain whether it covered trucks leased by the insured to others where the lease agreement required the lessee to provide casualty insurance. In *Thorsness v. United*

States, 260 F.2d 341 (7th Cir. 1958), although relying on the same exception that Respondents do. the court specifically found that the agreement was ambiguous and uncertain and that, in any event, no objection had been made to the parol evidence. Finally, in *Landa v. Commissioner of Internal Revenue*, 206 F.2d 431 (D.C. Cir. 1953), the court allowed parol evidence to explain the word "indebtedness," which in the circumstances might be defined as alimony, as the taxpayer insisted. Landa's holding is criticized in *C.I.R. v. Danielson*, 378 F.2d 771, 779 (3d Cir. 1967).

Here, however, there is no ambiguity that permits an exception to the parol evidence rule. Furthermore, contrary to Respondents' contention, the pact is not covered under the same rules established by decisions dealing with collective-bargaining agreements and the alleged relinquishment of a right protected by Section 7 of the Act, which generally permit the receipt of extrinsic evidence. *Indianapolis Power Co.*, 273 NLRB 1715 (1985), remanded sub nom. *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986), decision on remand 291 NLRB 1039 (1988). Rather, Respondents seek an interpretation of the pact clearly at variance with its terms. If one company were suing another Company for a violation of the pact, parol evidence would not be permitted. *NDK Corp.*, 278 NLRB 1035 (1996). Here, the provision of the pact is unambiguous, and parol evidence is "not only unnecessary but irrelevant." *NLRB v. Electrical Workers MEW Local 11*, 772 F.2d 571, 575(1985).

Respondents' argument that the qualification of a strike should be read into paragraph 8 under the principles of ejusdem generis also has no merit. That rule of interpretation provides that "general words following a detailed enumeration will be confined to things of the same kind . . . as the particular matters mentioned," 18 Williston, Contracts Sec. 1968 (3d ed. 1978); *Black's Law Dictionary* at page 517 (6th ed. 1990); and specific words following

general ones restrict application of the general term to things that are similar to those enumerated. 2A Sutherland, *Statutory Construction* Sec. 47.17 (1992 rev.). The pact contains no detailed enumeration of anything, no recitation of similar events. and no sequence or series. The agreement contains nine paragraphs, only three of which (numbered 3, 5, and 6) pertain to the event of a strike. The inclusion of that language in those paragraphs does not dictate that like language should be included in any or all of the other paragraphs, particularly paragraph 8.

Finally, I discredit all oral testimony that seeks to persuade me that the words "in the event of a strike" was meant to be included in the last paragraph. The agreement recites that all Respondents, by signing the agreement, acknowledged that they had carefully read the pact and understood their respective obligations. I find it improbable that they would have signed an agreement exposing themselves to such enormous damages if they decided to proceed separately at any time, when they meant to limit that damage provision to apply solely to the limited situation of a strike. I also find that each Company committed itself to the payment of Long's fees and would hardly have welcomed other Companies removing themselves from the group, leaving the remainder responsible for a greater share. In addition, their testimony would make redundant the first half of paragraph 6, which provides:

> Each Distributor in the event the Union calls a strike against any one, some or all Distributors shall take no action inconsistent with the purpose of this Agreement; nor shall any Distributor not struck seek to take advantage of said strike conditions to the detriment of the struck Distributor or any of them.

The purpose of the agreement is the correction of what Respondents perceived to be the inequities of the DDOM agreement by a joint commitment to proceed together and protect one another. Respondents' actions are consistent with

this purpose. Thus, they retained the same negotiator, Long and his company, West Coast, which would be paid by all the Companies in the same ratio, regardless of whether its services for one were lengthier than any other. For example, if negotiations were held for Eastown and lasted only an hour, but negotiations for Don Lee Dearborn lasted 10 hours, the Companies' share of Long's fee would not change, demonstrating that all the negotiations were intended to benefit all the Companies equally. Indeed, the pact provided that Respondents share not only the costs of West Coast's services specifically described in the agreement but also "[o]ther services a majority of [Respondents] may authorize." Thus, a Company would have to pay for West Coast's services that company did not want, but three others did.

Respondents planned their demands jointly. Almost as a rule, representatives of all the Companies attended each of the negotiations. They caucused together. They presented a solid front at each session. They made their proposals at the same time. They explained their positions jointly. They made the decision jointly to declare impasse and declared impasse at the same time. They implemented their proposals at the same time. They wrote the same letters. They hired, through West Coast, a company to recruit strike replacements. They advertised in newspapers, as "The Coalition for Jobs Preservation," attempting to persuade the public of the righteousness of their cause, stating: "We will do our best to avoid disruptions in service or supply of our brands to our consumers due to our difficulties with the Teamsters." As the Coalition, they wrote their retailers. referring to "our contract" and "our new offer." Long, too, referred to them as a group, complaining that other employers did not join them *"because they were afraid!!"* Long hoped his letter (March 23, 1990) would "take the edge off your [Respondents'] concerns about *perfecting a final offer* amongst you. . . . Our concern is how quickly we reach

an impasse and savings (if an agreement is not possible as I believe)."

Paragraph 6 of the pact provides that the purpose of the agreement shall not change should the Union strike. The commitment to act together remains. Thus, a struck Company shall not deal directly with the Union in order to extricate itself from the strike, nor make any contract that has not been approved by the majority. So read, paragraph 6 would merely duplicate paragraph 8 if Respondents' position that paragraph 8 applied only in the event of a strike were sustained. I find, to the contrary, that paragraph 6 was intended to bolster Respondents' commitment if a strike occurred. Thus. I reject Respondents' contention that paragraph 8 does not mean exactly what it states. In so doing, I have carefully reviewed Respondents' extensive arguments devoted to an almost word-by-word examination of the pact to explain paragraph 8's relationship to the rest of the pact, in order to persuade me that it must be read differently. With due regard to the ingenuity of counsel, I simply find no different meaning. I reject all the arguments.

The theory of the amendment to the complaint is that Respondents' professed coordinated bargaining was nothing more than a ruse for multiemployer bargaining, that their bargaining was in bad faith, and that they were not entitled to implement any of their proposals. It is Board law that both parties must agree to multiemployer bargaining. That is solely consensual, and Respondents could not force upon the Union their desire to bargain as a group. As stated by the administrative law judge in *Utility Workers Local III (Ohio Power Co.,* 203 NLRB 230, 238 (1973), enfd. 490 F.2d 1383 (6th Cir. 1974):

> The duty imposed on employers and labor organizations by the provisions of the National Labor Relations Act to bargain collectively is predicated on the cardinal principle that the existing unit, whether established by certification or voluntary recognition,

> fixes the periphery of the bargaining obligation. An employer and a union may voluntarily agree to merge separate bargaining units for the purposes of contract negotiations, but the enlargement of bargaining units is not a mandatory subject for collective bargaining under the terms of the Act.[7] Neither an employer nor a union is free to insist, as a condition of reaching an agreement in one unit, that the negotiations also include other units, or that the terms negotiated in the first unit be extended to other Units.[8]

There is no formal organization necessary to support a finding of a multiemployer group. *Frito-Lay, Inc. v. Teamsters Local 137,* 623 F.2d 1354 (9th Cir. 1980), cert. denied 449 U.S. 1013 (1980), and 449 U.S. 1112 (1981). "Substance rather than legalistic form is all the Board has ever required in multiemployer bargaining." *Town & Country Dairy,* 136 NLRB 517, 523 (1967); *Metz Brewing Co.,* 98 NLRB 409, 410 (1952). To form a multiemployer group, individual employers need only express an unequivocal intention to be bound in collective bargaining by group rather than individual action. *Komatz Construction Co.* v. *NLRB,* 458 F.2d 317, 321 (8th Cir. 1972). The fact that the employers may bargain "separately" over minor issues that may apply to them individually does not negate a conclusion that they otherwise engaged in joint bargaining because separate negotiations over some items is not inconsistent with group negotiations for a labor agreement. See, e.g.. *The Kroger* Co., 148 NLRB 569 (1964), which

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[7] Cf. *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 164; *NLRB v. Borg-Warner Corp.*, 356 U.S. 342.

[8] *Standard Oil Co. v. NLRB*, 332 F.2d 40, 45 (C.A. 6, 1963); *Douds v. International Longshoremen's Association*, 241 F.2d 278 (C.A. 2, 1957); *NLRB v. South Atlantic & Gulf Coast Longshoremen's Association*, 443 F.2d 218 (C.A. 5, 1971). See also *United Mine Workers v. Pennington*, 381 U.S. 657, 666-667.

illustrates that the employers may be part of a multiemployer unit, even though they sign separate agreements, rather than being bound by one master agreement.

Respondents counter that they were engaged in coordinated bargaining and not multiemployer bargaining. Even before bargaining began, West Coast. in a 1990 article, *Collective Bargaining and the Beverage Wholesaler,* explained its understanding of group or multiemployer bargaining and coordinated bargaining, as follows:

> *Group Bargaining*
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> All wholesalers band together into one association and execute a single agreement with the union that covers all wholesalers equally for the most part. Unions like associations since they can whipsaw[9] the weak links by otherwise striking them and not the others who may be stronger. The employer's answer is a lock out at the non-struck wholesalers operations. Since lock outs are fraught with pitfalls, including the inability to hire permanent strike replacements, group bargaining is not as effective as coordinated bargaining.
>
> *Coordinated Bargaining*
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> All wholesalers band together and select a common bargaining spokesman, but each wholesaler makes independent decisions and has its own independent contract with the union. This form of bargaining, if done correctly, can produce the maximum bargaining

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[9] *Roberts Dictionary of Industrial Relations* (rev. Ed. 1971) defines "whipsawing" as: "A union strategem seeking to obtain benefits from a number or group of employers by applying pressure to one, the objective being to win favorable terms from the one employer and then use this as a pattern, or perhaps a base, to obtain the same or greater benefits from the other employers, under the same threat of pressure (including a strike) used against the first one."

power for wholesalers. Unilateral implementation of the respective wholesaler's final offer after impasse is the ultimate power tool. Utilizing a lock out can almost always be avoided. The union either accepts the wholesalers offer or refuses to accept. In the latter case, if the union does not strike, employees nevertheless work under the terms and condition of the wholesaler's final offer. If the union does strike, workforce can be permanently replaced with a distinct possibility the union will be decertified. Since the union knows or should know this, they will be more reluctant to strike and more likely to reach an agreement favorable to the wholesaler.

When Respondents' method of bargaining was first mentioned to the Union, it was defined as "concurrent" and not "coordinated." On March 6, 1990, before the opening of negotiations, West Coast Attorney Patrick Jordan wrote to Knox that the Companies were "prepared to meet with you jointly and engage in concurrent negotiations." Knox replied on March 15 that he had not agreed to meet jointly or to engage in concurrent negotiations, stating that he did not even know what that meant. Jordan wrote back on March 21:

> As I understand it, you do not understand how five employers can bargain on an individual basis with a union, in the absence of a multi-employer group. As I explained to you, these employers have withdrawn from the multi-employer group and have unqualifiedly stated their desire to bargain on an individual basis. In doing so, the employers are prepared to meet with you concurrently and, as I have represented. the proposals they will be submitting to you are for all intents and purposes virtually identical save and except for those areas in which they may desire to make separate proposals.

At the opening of negotiations on March 27, 1990. Long suggested that the Union engage in concurrent, coordinated bargaining, so that all the Companies would attend the bargaining sessions simultaneously. Long conceded that the issues would be somewhat different with Eastown, for example, which delivered 40-ounce bottles; no other Company did. Eastown did not have a reclamation department; all other Companies picked up empty bottles and reprocessed them under Michigan's reclamation act. Only Powers employed mechanics, and it was the only Company with mechanics in its bargaining unit. (Only Hubert employed assistant drivers.) Otherwise, the Companies expected and intended to reach identical agreements. However, the companies would be signing separate agreements, and if them were separate issues, the negotiations could break down into subcommittees. Long recognized that, if Knox refused to participate in concurrent bargaining, Long had to permit separate bargaining, but threatened that, if Knox wanted separate sessions for each Respondent, Long would come to the first session for the first employer and Tom Vella, Hubert's administrative general manager, who had a law degree (he became the Respondents' notetaker), would attend the sessions for the other five employers, agreeing to no more and no less than what Long did in the first meeting. Knox reluctantly agreed to the "concurrent" bargaining, adding that he would see how it progressed.

Thirteen "concurrent" sessions were held, the last on June 27, 1990, when Knox told Thomas that he was dissatisfied with the concurrent bargaining, that it was not making any progress, and that it appeared to be no more than joint bargaining because all the Companies were taking the same position even when the Union was trying to talk to one Company. He asked to meet separately with each Company, believing that there were different needs among all of the Companies that he hoped to explore and that certain smaller Companies would more likely make peace than the larger

ones. Thomas was unhappy. He did not want separate bargaining. He had tried that in Buffalo with another Teamsters local and it did not work. However, he said that the Union had that right and agreed to individual bargaining. but stated that Knox's request was solely for the purpose of delay. Thereafter, the negotiations were held, allegedly with each Company individually, almost always on a rotating basis; but the physical appearance of the negotiations did not change. Thomas was still the principal negotiator, except on those occasions when Long returned, but representing a different Company at each session; and the representatives of the individual Companies became the members of the bargaining committee for the Company that was then bargaining and were present at each meeting thereafter, as the committee for the Company whose turn it was to negotiate.

There was nothing inherently wrong that those same representatives should continue to be present at each negotiating session. If anyone can agree on what "coordinated bargaining" is about, at least there should be agreement that representatives of other unions or employers may be present at discussions which do not directly and immediately affect their own interests. Board law makes clear that parties to negotiations generally have the right to designate whomever they want to participate as their representatives. So, typically, one Company could have representatives of other Companies serve on its negotiating committee. But the right is not unrestricted. The representatives may not be "so tainted with conflict or so patently obnoxious as to negate the possibility of good-faith bargaining," *General Electric Co.*, 173 NLRB 253, 254 (1968) (fn. omitted), enfd. as modified 412 F.2d 512 (2d Cir.

1969);[10] and they may not be representatives where there is other evidence of bad faith or ulterior motive that the party is engaged in a subtle plot to bring about bargaining in a unit broader than the one the parties have agreed to or that is certified, *Standard Oil Co. v. NLRB,* 322 F.2d 40 (6th Cir. 1963), enforcing 137 NLRB 690 (1962).

General Electric, an 8(a)(5) case, held that the company had no right to refuse to bargain with a number of international unions that had established a Committee of Collective Bargaining (CCB), the purpose of which was "to formulate a set of common goals and to seek to achieve these objectives through a 'coordinated approach' to bargain with" the company. 173 NLRB at 253. To reach that conclusion, the Board had to find that the International Union of Electrical Radio and Machine Workers (IUE) was not engaged in illegal conduct. The Board found that the IUE did not intend, by adding as its representatives, members of the CCB, to bargain for anyone other than the IUE and there was no understanding that any agreement reached would be subject to the approval, disapproval, or adoption by any other union. Ibid. Because the employer left the bargaining table before negotiations began, the Board found it unnecessary to decide whether the participating unions had been locked into a conspiratorial understanding and found it unnecessary to decide whether the company could have suspended negotiations if it found that the non-IUE representatives were seeking to bargain for their own union, rather than the IUE. The Board found only that the mere presence of the outsiders was not inherently disruptive of the bargaining process.

The dissent was concerned that: "such representatives could attempt to bargain for their own unions while serving on the negotiating committee of another, or they might claim

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[10] See also *Minnesota Mining & Mfg. Co.*, 173 NLRB 275 (1968), enfd. 415 F.2d 174 (8th Cir. 1969).

to be bargaining for one union when, in fact, they were locked into an understanding that no union would sign an agreement unless all unions did." Id. at 255. The Board answered that the recognition of "the possibility of abuse is quite different from concluding . . . that abuse is inherent in any attempt at coordinated bargaining." Ibid. Rather, the Board insisted on substantial evidence of "ulterior motive or bad faith." Ibid. That evidence was lacking. Further, the Board stated, at page 256:

> [A] holding that the mere presence of "outsiders" is so inherently disruptive of the bargaining process as to privilege an employer's refusal to bargain would substantially limit the opportunity for collaboration and cooperation between unions. It would, for example, prevent an expert employed by one union from assisting another union at the negotiating table, even though the negotiating union might be seeking nothing more than technical advice from the "outside" representative. We do not believe that this kind of collaboration is inconsistent with the statutory objectives . . . .[11]

The Board has only infrequently described the kind of permissible collaboration and cooperation that parties may engage in before crossing over into the area of joint or coalition bargaining. Regarding the composition of bargaining committees, *General Electric* permits assistance from experts who represent other employers and unions. *Indianapolis Newspapers,* 224 NLRB 1490 (1976), permits the participation of the representatives of other in-plant unions, when they have no right to vote on the committee,

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[11] Obviously, the same right to determine the composition of its own bargaining committee exists for employers as well. A company's choice of negotiators, including experts from other companies, would be subject only to the kind of limitation already placed on unions.

and all such rights remained vested exclusively in those persons who were members of the negotiating union. Obviously, *General Electric* also permits other representatives to be present, but the Board never states when the point is reached when cooperation with those representatives becomes "conspiratorial" or "a subtle plot."

The Board has also found, under certain circumstances, some right to coordinate bargaining proposals without creating a larger unit. In *Frito-Lay, Inc.* v. *Teamsters Local 137,* 623 F.2d 1354, 1359 (9th Cir. 1980), the court stated that: "[U]niformity of labor standards is a legitimate union goal." In *Standard Oil,* the Board found that it was not unlawful for the unions involved to seek common termination dates for contracts covering the various units they represented. 137 NLRB at 691; *United States Pipe & Foundry Co.* v. *NLRB,* 298 F. 2d 873 (5th Cir. 1962), enfg. *Steelworkers (United States Pipe & Foundry Co.),* 129 NLRB 357 (1960), cert. denied 370 U.S. 919 (1962). In addition, unions dealing with a common employer with separate plants capable of manufacturing the same product may protect themselves by insisting that agreements be reached at all plants before any individual contract is signed because, otherwise, the employer could merely shift its production to other plants. *United States Pipe; Steelworkers (Lynchburgh Foundry),* 192 NLRB 773 (1971), enfd. 80 LRRM 2415 (4th Cir. 1972).

However, the parties may go too far. In *Standard Oil,* supra, a union violated Section 8(b)(3) by failing to sign a collective-bargaining agreement that it had agreed to, insisting that other labor organizations sign first, and those organizations were withholding their approval pending ratification of other contracts covering different bargaining units. Unions also violate the Act when they enter into pooled voting ratification procedures that require an aggregate vote of all the employees to approve each of the separately negotiated contracts, regardless of the outcome of

the vote by the employees affected by that contract. "[T]he pool's structure and operation impermissibly impose extraneous nonbargaining unit considerations into the collective-bargaining process." *Paperworkers Local 620* (International Paper *Co.),* 309 NLRB 44 (1992). Thus, wholly separate bargaining units could veto another unit's contract "on the basis of extraneous considerations having no direct bearing on the substantive terms of the other unit's contract." Id. at 45. That basis is a nonmandatory subject of bargaining. *Jefferson Smurfit Corp.,* 311 NLRB 41 (1993). Similarly, where unions have demanded and insisted that the employer had to make identical offers for all the units and that none of the unions would accept any offer relating to any one of the units until concurrent offers had been made for all of the units, a violation exists. *Utility Workers Local III (Ohio Power Co.),* supra, 203 NLRB 230. In *Frito-Lay, Inc.*, supra, the union demanded that three companies agree to either one contract covering all of them or three separate contracts containing substantially identical provisions for each company. The court found that the union's strike was aimed at forcing the three companies into a multiemployer group by reason of the demand for uniform contracts. In *Operating Engineers Local 428 (Phelps Dodge Corp.),* 184 NLRB 976 (1970), enforcement denied sub nom. *AFL-CIO Joint Negotiating Committee for Phelps Dodge v. NLRB,* 459 F.2d 374 (3d Cir. 1972), cert. denied 409 U.S. 1059 (1972), the Board found that the numerous union respondents and, through them, the *AFL-CIO Joint Negotiating Committee for Phelps Dodge,* had as one of their primary objectives the obtaining of an "agreement on terms and conditions of employment to be applicable generally on a companywide basis" and that their strikes throughout the company's facilities were intended, in substantial part, to force the

company to accede to the demands for a companywide agreement.[12]

The issue in this proceeding is whether Respondents' bargaining was coordinated, as Respondents insist, or was joint, as the complaint alleges. None of the decisions that permit coordinated bargaining allow negotiators to act as Respondents have done here. Respondents are six employers, not even competitors of one another. They seek essentially the same contracts, at the same negotiations; they are bound to proceed jointly by a pact that subjects them to substantial damages if they proceed independently; and three Companies bind the other two to any of the minimums.

Although the Companies have an absolute right to seek the best agreement they can obtain and to cut back costs and eliminate "restrictive" rules, they do not have the right, without the Union's consent, to engage in joint bargaining with the Union. What Respondents have done here is joint bargaining, and nothing more. Their bargaining has no other distinguishing qualities. When Knox asked why it was not joint bargaining, Long answered that each Company would sign a separate agreement and that there would be some minor differences in the contracts. That is not enough. *Frito-Lay* and *The Kroger Co.* hold that those facts are not indicative of separate bargaining, because there may be joint bargaining even with separate individual contracts. *Kroger* also instructs that the mere minimal differences in some of the separate contracts is not enough to transform these negotiations into truly separate negotiations representing different interests. Furthermore, Long and Jordan suggested

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[12] The Third Circuit refused to enforce the Board's decision, finding, contrary to the Board, that separate negotiations were conducted at each company's unit and no bargaining was conducted at any unit with respect to the wages and conditions of employment at any other unit.

that the Union engage in "concurrent, coordinated" bargaining. The result of the Union's acquiescence was that all the Companies simultaneously attended the bargaining sessions, and that was no different from the manner in which joint bargaining is traditionally conducted. *Frito-Lay, 623* F.2d at *1360-1361.*

Respondents contend that their proposals were those of each Company independently, but the commitments of the pact had to restrict them in their actions. When they each made the same proposals as all the others, their proposals were not independent. They were joint. And their approval of their proposals to the Union, before they were even offered, was just as much a violation as the unions' ratification of companywide contracts, because none of Respondents' proposals were going to be any different. Respondents simply jointly agreed about the contents of the contract; and that is the same as *Utility Workers Local 111 (Ohio Power), Paperworkers Local 620 (International Paper),* and *Standard Oil,* where a violation was found when no union could agree to a contract unless the other unions agreed.

Long, Thomas, and Jordan did not hide the fact that that they expected all the agreements to be basically identical and all their proposals were "basically identical." In *Operating Engineers Local 428 (Phelps Dodge Corp.),* the unions sought common contracts, at least as to all major economic issues, and the Board held that to be invalid. In *Frito-Lay, Inc. v. Teamsters Local 137,* the unions wanted identical language in all their contracts, and the Board found a violation. Although the court found no violation in *United States Pipe,* when the three unions sought common termination dates, it recognized that, by seeking the same provision, the negotiating union was seeking terms for the

other units; and that was "an apparent expansion of the scope of the bargaining unit." 298 F.2d at 878.[13] Here, the Companies sought common language as to every component of the contract, including noneconomic items such as management prerogatives. simplified vacation language, and zipper clause. Even if the Companies were direct competitors, and there is no evidence that they are, and desired to maintain equal wages and benefits, so that they would remain competitive and not lose business because they were not, there is no justification for permitting them, under the guise of coordinated bargaining, to seek a common contract, the only difference being the name on the signature line.

Joint bargaining permits bargaining for more than one employer, while coordinated bargaining is only for a single employer. In coordinated bargaining, there is true separate bargaining, but in "coordination" with others. The agreement, however, forbids any Company from directly negotiating with the Union. That is the exact opposite of what was required of each Company by the Act and the

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[13] Even *Electrical Workers IBEW Local 46 (Puget Sound)*, 302 NLRB 271, 274 (1991), relied on by Respondents, notes that: "It will always be the case that employers who make clear their intent to bargain separately may in the end decide to agree to terms mirroring those agreed to by a multiemployer group. Indeed, unions often urge such agreement without conceding that *this obliterates the boundaries between multiemployer and single employer negotiations*." (Emphasis added.) In any event, that decisions and *Walt's Broiler*, 270 NLRB 556 (1984), also relied on by Respondents, involved conduct by employers that was alleged to be inconsistent with their stated intent to abandon group bargaining. In both, the Board found that they did not intend to be bound by the multiemployer negotiations. In both, there was no issue, as here, that the employers exceeded the proper boundaries of coordinated bargaining. There is no contention here that Respondents wanted any part of the DDOM. The sole issue here is whether, under the facts of this case, Respondents bound themselves to a new group, those who were represented by Long.

opposite of any theory that permits coordinated bargaining. When separate bargaining occurs, the primary employer makes the ultimate decision regarding contract provisions. But the dictates of the pact prevent that from happening. Instead, three Companies may take control of the decisions of the party then negotiating; and that flies in the face of all the Board authority that insists that the party negotiate for itself, without extraneous matters playing a hand. And it is extraneous that three of the Companies are not willing to compromise on a matter that the principal party to those negotiations is willing to compromise. Furthermore, although unions may have a legitimate aim to see that their general wages and standards are not undercut (note that all the decisions cited above are union coordinated bargaining cases), it is more difficult to understand how legitimate employer interests are promoted by their joint insistence on the same conditions. For example, there is no reason that they must have the same arbitration clause, with the same method of selecting an arbitrator, and the same steps and time limits for presenting grievances. Yet that type of clause, as well as many others, was present in each of the allegedly separate offers made by Respondents, just as identical offers would be made, at the same time, in joint bargaining.

The Companies opted out of their prior multiemployer group (DDOM) because they were dissatisfied with being outvoted by other employers whom they thought too easily gave in to the Union. Yet they opted into a new arrangement, because they had reached an agreement with these employers about exactly what they wanted and they agreed to jointly pursue these aims and goals, under penalty of substantial penalties if any of the group backed out of its commitments. They had the courage to join together, whereas other employers did not "because they were afraid!!" That they agreed in paragraph 1 of the pact that they intended to engage in coordinated bargaining, means nothing in the face of their joint actions. I reject the import

of their self-serving declaration, as the Board did in *Paperworkers Local 620 (International Paper)*, 309 NLRB 44 (1992), where it found a violation despite the six unions' agreement that their pooled voting procedure was merely "coordinated bargaining" and that each local would "continue its independent decision making in their separate bargaining units." Long seemed to be wedded to the notion that, somehow, coordinated bargaining could thwart the Union's whipsawing, while avoiding the necessity of the employer's use of a lockout. Thus, his emphasis is not on the coordination of bargaining for the effect that it will inform the other employers about what is happening so much as it is the pressure that it will supply in the event of a breakdown. Coordinated bargaining avoids the need for lockouts, as it promotes impasse with two consequences, either a strike and the hiring of permanent replacements, or, alternatively, the imposition of the terms of the final offer. Whether the bargaining technique really does what he thought is irrelevant.[14] It is here employed merely as a tactical device and does not promote separate bargaining. The way Long went about it, with the pact and identical offers, the bargaining was joint.

Long never intended that these negotiations be with the individual Companies. His threat that, if Knox wanted separate negotiations, Long would attend the first session and he would send Vella to the next five, set the tone for the remaining negotiations. Not that there were identical discussions at each, but that separate sessions would serve not the purpose of individuality, but of sameness, that all negotiations were to result in no less and no more than the commitments made at other negotiations, and that commitments for one would be commitments for all.

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[14] Prevention of whipsawing is a purpose of joint bargaining, too. I Hardin, *The Developing Labor Law* 508-509 (3d ed. 1992).

Conversely, what one Company did not accept, no other would. As Long observed in his very first statement to the Union on March 27, 1990:

> We can meet individually for each company on a routine basis at alternative times and dates. Our bargaining committee shall, in such cases, consist of a representative from each of the six (6) facilities I represent. Our proposals shall be the same for each company. In essence, we shall have six (6) redundant meetings. Although a waste of time, we are prepared to proceed.

Thus, there was to be a lack of an individual response to problems directed at a single Company. All the Respondents proposed exactly the same provision, whether they had problems or not. For example, Knox wanted employees of Don Lee Dearborn to have the right to bid daily for their routes because he felt that that Company approached its assignments with a "reward and punishment" mentality. His solution on July 18, 1990, may have been somewhat clumsy, but at least it was aimed at what he perceived to be a problem there. However, despite that fact, all Respondents, not just Don Lee Dearborn, countered with an offer on route bidding in their next proposals. At the September 10 negotiations with Powers, Union Attorney Sam McKnight asked Bob Bloom, a Powers' representative, the reason that Powers had made a mute bidding proposal. Bloom was unsure. McKnight asked: "Do you even know what it's all about?" Thomas then interrupted, explaining, "That's off the table. That's withdrawn." When McKnight expressed his surprise, Thomas explained that the Union had not responded to Respondents' proposal during the last two sessions. McKnight pointed out that the last two sessions were negotiations with two other Companies, not Powers, with

whom the Union had not met. Nonetheless, Thomas responded: "Yes, it's withdrawn. "[15]

Another issue that Knox tried to raise individually with the various Companies was starting times, which they uniformly wanted to eliminate. After they had implemented their last, best, and final offers, Knox asked Jim Quasarano, Eastown's president, how his work assignments had changed. He replied that only two drivers had been scheduled to start at 6:45 a.m., 15 minutes before an 8-hour-a-day employee was permitted under the old contract to start, and 15 minutes later than a 10-hour employee was permitted to start.

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[15] Respondents contend that Thomas made this proposal on behalf of all Companies, in order to have something to trade. Even if I believed him which I do not, his proposal brings extraneous matters to the bargaining table, unrelated to the Union's concern about conditions at Don Lee Dearborn. Furthermore, a proposal that is unresponsive to any party's need is a prime example of bad-faith bargaining. In so finding, I note that later, the Union proposed daily route bidding to all Respondents. However, I credit Knox's explanation that, because of Respondents' withdrawal of its proposal, the only way to obtain route bidding at Don Lee Dearborn was to negotiate the same proposal with all six Companies, despite the fact that it was unimportant to the Union at the others. Knox narrated the following dialogue: On October 17, 1990, which was a negotiating session with Oak, there was a brief discussion of route bidding. Bob Gustafson said that he was really confused about the Union's position on daily route bidding because, in the past, the Union had always believed that it was healthier to have a regular driver in a given area so that he was familiar with his area and retail customers. That was also healthy for the retailer because he knew the driver when he came in, was not concerned about where he was going, and learned to trust him over a period of time. It was more efficient for the company, too, because the driver knew where he was going and could save the time of having the retailer send somebody back with him and check his work. Knox explained that it really was not the Union's proposal; it was Respondents' proposal that they gave for all six Companies, making it clear that it was really all of them or nothing. At that point, Thomas cut Gustafson short, saying "All of the distributors will give consideration to a daily route bidding providing we get rid of the job restrictions." Even then, the contract were to be identical.

Quasarano said that most of his customers were not open any earlier. When Knox asked why Quasarano wanted to eliminate all the starting times, Thomas interrupted with the answer that if a customer wanted an earlier delivery, it should be the Company's decision to grant that request.[16] Thus, in all the discussions of starting times, Respondents were wedded to rid themselves of any restrictions, despite the fact that to Eastown it was hardly of practical necessity. (Unfortunately, the record is silent regarding the hours worked by the two employees.)

In the same session, Knox asked Quasarano whether he had utilized the bulk unloading with mechanical devices since the implementation, and he replied that Eastown did not have supermarkets in its jurisdiction, and its only use for bulk unloading was at Joe Louis Arena and Tiger Stadium, where the old agreement permitted the use of mechanical devices. Thus, Eastown had no need for the provision that the Companies were generally insisting on. When Knox asked Quasarano directly why he thought it so important for Eastown to eliminate the prohibition of mechanical devices, once again Thomas interrupted and answered for him, noting that the "offer is similar to the other distributors." Knox asked, "[S]o you want to keep the contracts the same?" and Thomas replied, "[R]ight, we have a history of similar contracts." [In fact, Thomas' answer was inaccurate. Eastown had the same contract only since 1987; before, its contract was different from those of the other Companies.][17]

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[16] The old agreement provided that an employer had the right to make a special request to the Union to start earlier. Requests were made under the agreement only a "couple of times," and the Union's executive board never turned down the request.

[17] Knox also discussed the application of the "deliveries to coolers" provision to Eastown, only to find out that Eastown had used it perhaps twice, and it did not seem to Knox that important to Eastown's operations.

At the negotiations on June 7, 1991, with Oak, Ron Baetens, its president, indicated that his employees were working "eight sometimes eight-and-a-half, nine hours." In light of that representation, Knox was disturbed that Oak and the Union had not reached an agreement on overtime and asked if he knew what the Union's offer on overtime was. Baetens said that he did, that it was 2 hours a week; and Knox responded that he offered 4 hours a week, with a limit of 2 hours a day. Knox asked whether Baetens had even read the proposal, but Thomas interrupted, saying that Baetens read it and he wanted no restrictions. These events, when combined with the restrictions of the pact and Respondents' resolve to sign the same contracts, are persuasive evidence that there was an impediment to the Union's right to bargain separate agreements.

Respondents contend that the Union cannot complain of Respondents' conduct when its own conduct demonstrated that it was treating Respondents as one unit. However, whatever faults some of his proposals may have had, Knox made it clear from the beginning of negotiations that he was not enamored of concurrent bargaining and he wanted an opportunity to deal with the Companies individually. At the first negotiating session, Knox questioned whether "coordinated bargaining" would work, and that it looked to him like joint bargaining, but said that he would give it a try. On May 21, Knox expressed a desire to meet the special needs of smaller companies and suggested, but did not push for, separate bargaining with the Companies, rather than coordinated bargaining. On May 22, Knox and his assistant asked how "joint and concurrent" differed from "joint" bargaining. Long responded that "joint and concurrent" was not "joint" because some of the Companies had separate issues and there would be minor differences. Knox again pointed out the differences between Respondents. On June 11, Knox again said each Company had different issues which required different treatment. On June 27, the Union requested true separate bargaining, Knox complaining that

"concurrent" bargaining seemed too much like "joint" bargaining. Thomas replied that he would go along with the Union's request because he was legally required to do so. Thomas regarded Knox's request as lawful but "unreasonable."

On July 2, Thomas wrote Knox expressing his shock at Knox's assessment that coordinated bargaining was not working. Thomas stated: "[T]he contract for all the distributors we represent is essentially identical. . . . [W]e believe that this ploy [requesting single unit bargaining] . . . represents nothing more than yet another dilatory tactic on your part." On October 15, Knox complained that, despite the fact that he had asked for separate bargaining, it still looked to him as if Respondents were engaged in joint bargaining. Thomas denied that it was joint bargaining. On November 8, Knox wrote to West Coast, repeating his complaint:

> [I]t is your clients who said that they were withdrawing from joint bargaining and wanted separate bargaining. As I have previously said, at this stage I think true separate bargaining would be helpful, and that is why the Union has been insisting on separate negotiations. I believe you and your clients *in fact* are engaged in your version of joint negotiations and making it extremely difficult to harvest the progress that would be available if the employers truly bargained separately.

Long replied the next day, labeling this paragraph "as phoney [sic] as you are." His answer, he wrote, was the same as he gave Knox on March 27, 1990, and he quoted and emphasized it:

> Although it is the intent of each Company to execute a contract solely for each company and its employees. the bargaining positions of each are the same *and any proposal I offer for any one of them will be identical for the others for delivery department and warehousing*

department personnel representing the bulk of each bargaining unit.

[This language was repeated numerous times by Respondents. For example, Thomas wrote Knox on December 20, 1990: "Keep in mind it is our intent to have the same agreement for all (Respondents) we represent."] On December 6, McKnight asked whether all the Respondents' final proposals were identical, and Thomas replied that there were some differences in classifications, but other than that they were identical. McKnight then asked why they decided to have separate bargaining if the employers had virtually identical problem. Long replied that he felt it was the most efficient way to bargain. On January 8, 1991, Knox complained, "We should have true separate negotiations." All of Knox's comments demonstrate that he never consented or acceded to joint bargaining. Instead, he insisted on separate bargaining.

Respondents' group bargaining, conducted without the Union's consent and contrary to Respondents' responsibility to bargain individually with the Union for their separate units, was illegal from its inception. The Union never received what it was entitled to under the Act. Respondents were bargaining as a group, in effect asking the Union to accept the six employers as a multiemployer group, a nonmandatory subject of bargaining. "The parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit is for bargaining." *Dowds v. Longshoremen's Assn.*, 241 F.2d 278, 282-283 (2d Cir. 1957). More than that: the Union was deprived the right to bargain with each Company separately and denied responses, based on that Company's independent judgment about what was best for it, and not best for the group. Respondents' joint bargaining makes it impossible to predict what might have happened during collective bargaining. It destroyed the bargaining process, I conclude that Respondents violated Section 8(a)(5) and (1) of the Act by

bargaining in bad faith, clearly within the 6 months prior to the filing of the charges, and also since the opening of negotiations in March 1990, under the cloud of the fraudulently concealed pact.

An impasse may be arrived at only when the parties have reached their disagreement after bargaining in good faith. *Taft Broadcasting,* id. at 478, *NLRB v. Pacific* Grinding *Wheel Co.,* 220 NLRB 1389 (1975), enfd. 572 F.2d 1343, 1349 (9th Cir. 1978); *United Contractors,* 244 NLRB 72, 73 (1979). enfd. mem. 631 F.2d 735 (7th Cir. 1980). I conclude, therefore, that Respondents were not entitled to implement any provision of their last, best, and final offers unilaterally. Thus, all unilateral implementations were illegal, and I will recommend that all be set aside and that all employees be made whole for any losses they suffered. That being the appropriate remedy in the circumstances, I find it unnecessary to decide whether Respondents also engaged in surface bargaining, as the complaint also alleges. I also find it unnecessary to rule on Respondents' many defenses, most of which are aimed at alleged misconduct of the Union. Nothing the Union did or failed to do makes any difference, because the six Companies' unlawful joint bargaining from the beginning made meaningful bargaining about terms and conditions of employment by individual Companies a legal and practical impossibility.

What remains to be discussed are various specific changes made by Respondents, or some of them, that the complaint alleges also violated other doctrines of Board law. Although many of these changes will be rescinded pursuant to the status quo order that corrects the illegal implementations, they may require additional relief. The complaint alleges that two of the changes made by all or some of Respondents were not even reasonably

contemplated by the last, best, and final offers: one, the elimination of the wage rate for pre-sell drivers[18] and, two, the implementation of the bulk route system. The DDOM agreement provided that pre-sell drivers were paid an hourly base wage rate of $8.33 plus a 30-cent-per-case commission from May 1, 1989, until contract expiration. Respondents continued paying wages and commissions until April 15, 1991, the date of their economic implementation. Throughout negotiations, they proposed to eliminate wages and implement an all-commission compensation structure for pre-sell drivers, a proposal that was contained in their final offers, as follows: from May 1, 1990, to April 30, 1991, a 27-cent-per-case commission for all cases (except 32-ounce cases and up were to be paid at 28 cents per case), plus three cents per case for empties; from May 1, 1991, to April 30, 1992, a 27.5-cent-per-case commission for all cases (except 32-ounce cases and up were to be paid at 28 cents per case), plus three-and-a-half-cents per case for empties; and after May 1, 1992, a 28-cent-per-case commission for all cases (except 32-ounce cases and up were to be paid at 29 cents per case) plus four cents per case for empties. When Respondents implemented its economic proposals on April 15, 1991, they stopped paying wages but, instead of paying the 27-cent-per-case commission, which is what they offered, they continued the DDOM rate of 30 cents.

Respondents contend that their only obligation with respect to their wage implementation was to implement an all-commission wage structure, which they did by eliminating the base wage rate contained in the expired DDOM agreements and continuing the commission rate of 30 cents per case. In this respect, Respondents contend that

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[18] Pre-sell drivers deliver beer that has been sold in advance. Driver salesmen sell the beer at the time that they go to the retailer's establishment.

the bargaining history shows that the implementations were "reasonably encompassed by the final offers" and, to the extent that they were not, the discrepancy was contemplated by the bargaining history and specifically set forth in Thomas' April 10 letter. I find no merit in these contentions. Under the DDOM agreement, the wages and commissions comprised the earnings of pre-sell drivers. Respondents repeatedly stressed in negotiations that they were concerned about the overall compensation of their employees, not just wages versus commissions. Thus, Long's survey of the costs of similar services in other cities compares total compensation and its initial cover letter explaining its proposals states: "On driver compensation, for existing employees, we would like to believe we could create a cents per case commission that would achieve current levels of earnings through productivity improvement through elimination of restrictive work practices (some have referred to these practices as featherbedding)."

Respondents' proposal to alter those earnings by eliminating wages and paying 27-cent-per-case commissions was made in furtherance of their desire to achieve current levels of earnings. And, more important, that proposal was all the Union had to bargain about. The offer was not to eliminate wages and to pay 30 cents per case, an offer that Respondents never made to the Union; and the Union never had to the opportunity to consider the effect of that proposal and whether it might be willing to accept the same. The 3-cent difference was no small matter for an employee who delivered an average of 500 cases a day, that represented a $75-per-week increase.

Proposals concerning the earnings of employees are not severable. Respondents had no right to implement one proposal the elimination of wages while retaining a higher commission rate that was not part of its offer to the Union. The grant of this commission rate, greater than any offered in negotiations, demonstrated that Respondents were not acting

in good faith and was manifestly inconsistent with the principals of collective bargaining. *NLRB* v. Katz, 369 U.S. 736, 745 (1962); *NLRB* v. Crompton Mills, 337 U.S. 217, 224 (1949); *Western Publishing Co.*, 269 NLRB 355 (1984). Respondents' reliance on *Presto Casting Co.*, 262 NLRB 346 (1982), enfd. in part 708 F.2d 495 (9th Cir. 1993), cert. denied 464 U.S. 994 (1983), is misplaced. There, the Board permitted the employer to implement only the wage proposal of its final offer, which was considered clearly severable from and not inextricably intertwined with its benefits package. Finally, Thomas' letter to Knox on April 10 merely states that Respondents would continue to pay the present commission, but not base pay. That advice does not replace the offer that was on the table and is no substitute for bargaining. Thus, I conclude that Respondents violated Section 8(a)(5) and (1) of the Act.

The implementation of the bulk route system by Warren and Don Lee Dearborn, the only Companies involved in this allegation, presents a different problem, because the parties disagree about the meaning of bulk routes. The parties do not dispute that bulk routes involve deliveries of large quantities to certain customers, typically large supermarkets and large arenas, such as Cobo Hall, Joe Louis Arena, and Tiger Stadium. Prior to the implementation, the driver was paid hourly wages and a 50-percent commission of the applicable route commission. Respondents' final offers created a bulk driver classification with a $12-per-hour wage rate.

Beginning in early August 1992, Don Lee Warren and Don Lee Dearborn assigned bulk deliveries to presell drivers, whom they paid the hourly $12 rate, mostly to major chain stores such as Pace Warehouse and Warehouse Club. which before had been serviced by regular route drivers, who were being paid at commission rates. However, on some days, the Companies paid for deliveries to the same stores as if the drivers were on their regular route; and so they paid only

commission. The driver unloaded these bulk deliveries by hand, without the assistance of any mechanical devices or electrical equipment. Knox testified that inherent in the delivery by bulk is the use of a large semitruck equipped with a loading gate or electric power pallet jack to assist in the unloading of large deliveries.

The Companies contend, among other things, that the use of mechanical devices was not discussed and was not implicit in the definition of bulk deliveries. I agree. Don Lee Dearborn did not use mechanical devices for deliveries to special events under the DDOM agreement.[19] And there were no discussions at the bargaining table that indicated that Respondents' proposal to permit bulk routes incorporated the requirement that they use mechanical devices. The essence of the complaint is that the Companies' implementations were not encompassed by the last, best, and final offers. There is nothing here to show that the Companies actions went beyond what they were proposing. I conclude that this allegation should be dismissed. Nonetheless, as stated above, because there was no valid impasse, the recommended order will still require a restoration of the status quo.

The complaint alleges that, since February 7, 1991, Don Lee Dearborn unilaterally assigned casual employees to perform warehouse work at a time when warehouse employees were on layoff status. Similarly. since August 28, 1991, it unilaterally assigned casual employees to perform driving work at a time when regular driven were on layoff

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[19] I do not believe Knox's testimony that Don Lee Dearborn and Don Lee Warren made bulk deliveries with mechanical devices. He made too many misstatements during the course of his testimony, forgot facts that he surely must have remembered, and was guilty of many inconsistencies.

status and did so at times other than those stated in its last, best, and final offer, which provided:

> Casual employees shall not be used in any classification where employees are on layoff (i.e., an employee on layoff who has not yet been sent a notice of recall); nor shall casual employees comprise more than fifty (50) percent of the total work force. However, casual employees may be hired though other employees from a predecessor employer are still on a waiting list to be hired into full time positions by the successor employer. Such waiting list employees shall not impact in any way the hiring of casual labor.

Don Lee Dearborn laid off warehouse employees James Majkowski, Alexander Mazurek, and Jon Jerome and drivers David Kettler and Thomas Shaw, effective February 11, 1991. Warehouse employee Robert Mahn was on "on-call status" and worked 2 to 3 days per week from February 1991 to May 1991, when he worked full time. Mazurek and Jerome returned to work in the week ending April 7, 1991, and Majkowski, in the week ending April 21, 1991. Kettler quit on May 31, 1991. However. casual employees Robert Croskey, Jorge Garza (except perhaps the week ending April 29), Greg Pfeifer, and Sherry Jacques worked full time during the same time that the full-time employees were on layoff status.

Before the reclamation employees became classified as casual employees in February 1991, their job duties were limited to crushing cans and bottles, sorting bottles, stacking empty shelves, and driving hi-los in the reclamation area of the warehouse to move empty bottles and cans. During the same period, warehouse employees were exclusively responsible for stacking pallets onto delivery trucks, adjusting truckloads by moving pallets from one truck bay to another, stacking empty barrels. stripping delivery trucks, and parking and moving and putting gas into them. The reclamation employees did not perform any warehouse

duties prior to February 1991. However, after the February 1991 implementation of the casual employee classification clause contained in Respondents' final offers and the transfer of reclamation employees to casual employees, the casual employees began performing warehouse duties and driving hi-los in the drive-through area of the warehouse to perform these warehouse duties.

Jerome, Mazurek, and Majkowski were recalled from layoff in April 1991 and were again laid off on October 28, November 18, and December 20, 1991, respectively. Mahn was also laid off effective December 31, 1991, and returned to work in May 1992. Jerome and Majkowski were never recalled and were discharged from employment effective on April 28 and June 20, 1992, respectively, as their seniority was terminated in accordance with Don Lee Dearborn's last, best, and final offers. Mazurek quit work effective on April 24, 1992. In the meantime, Croskey, Garza, and Jacques continued to work full-time during the time that the regular warehouse employees were on layoff status and they and other casual employees (Brown, Schultz, and Murphy) performed warehouse duties.

Don Lee Dearborn contends that it did not hire casuals for the periods involved. I believe none of their testimony. The Company's records shows that the individuals were called casuals, and they were paid the rates that Respondents proposed for the casuals, between $7 and $10 per hour. If the records state that they were casuals and they were paid casual rates, I cannot credit anyone who relates that they were not casuals. Accordingly, I conclude that, having proposed that casual employees not perform warehouse and driving work when warehouse employees and driver were on layoff status. Don Lee Dearborn implemented an offer that was not contemplated by its final offer, in violation of Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, supra; *NLRB* V. *Crompton Mills*, supra; *Western Publishing Co.*, supra. In addition, Don Lee Dearborn made no attempt to

notify or consult with the Union concerning its assignment of casual employees to perform warehouse work. I conclude that the Company unilaterally changed this term of employment. in violation of Section 8(a)(5) and (1). *NLRB v. Katz,* 369 U.S. at 743.

This allegation brings us back to the original complaint, that Respondents bargained in bad faith by proposing the casual and probationary clauses which left Respondents in complete control of the terms and conditions of employment of the employees so designated. Thus, the complaint has always alleged that Respondents violated Section 8(a)(5) and (1) of the Act by implementing these provisions. The proposal for casuals permitted the Companies to hire casuals to fill in for employees on vacation; off work because of illness, disability, injury, or a leave of absence; or to meet seasonal or holiday peak work loads "and the like." They were to be paid no less than $7 nor more than $10. They were to receive no benefits and had no right to arbitrate their grievances; but they had to pay union dues. The probationary clause extended the probationary period from 30 days in the DDOM agreement to 90 days, permitted termination without cause, and provided employees with no benefits during that time.

The General Counsel relies solely on *Colorado-Ute Electric Assn.,* 295 NLRB 607 (1989). enf. denied 939 F.2d 1392 (10th Cir. 1991), cert. denied 504 U.S. 955 (1992). The collective-bargaining agreement there provided that employees received specified wages for each job classification in seven progression steps, and advancement from step to step was based on tenure. During midterm wage negotiations, the union wanted an across-the-board wage increase, while the employer countered with merit increases which would be granted at times and amounts determined by the employer and would not be subject to arbitration. The Board held that the parties could reach a lawful impasse on the employer's proposal, but the employer

was not entitled to implement the proposal because it involved "virtually unlimited discretion in determining the timing and amounts of merit increases. These are matters over which the Union has a statutory right to be consulted." Id. at 609.

Respondents agree with the Tenth Circuit's refusal to enforce *Colorado-Ute,* and the District of Columbia Circuit's refusal to enforce *McClatchy Newspapers.* 299 NLRB 1045 (1990), remanded 964 F.2d 1153 (D.C. Cir. 1992), a proceeding similar to *Colorado-Ute.* However. I am bound by Board law; and the Board has twice pronounced that an employer may not implement the kind of proposal that Respondents have made, where they have the unfettered control to pay a casual within a range of $3, without discussion with the Union and without the right to grieve to arbitration. Respondents denied that they implemented the casual employee clause, but the record supports the implementation by all. except Hubert. Accordingly, in this respect, I find that Respondents, except Hubert, violated Section 8(a)(5) and (1) of the Act. However, I find that the proposal to extend the probationary period to 90 days is not covered by either of the Board's decisions, and I do not find that the period of probation is so lengthy or so uncommon in collective-bargaining agreements that the proposal violates the Act. I will dismiss this allegation.

The complaint also alleges that, since November 18, 1991, Don Lee Dearborn unilaterally changed the route assignments and route-bidding procedure of its employees. Before, bidding for routes was based on seniority, and employees would bid based on the time the route would take, the number of cases that could be delivered. and other factors such as the safety of the route. Jay Yule, Don Lee Dearborn's general manager, and Bob Scott, its dispatcher, told employee Ronald Harris, a driver and the Union chief steward, on a Friday that they were changing his route the following Monday. The Company also changed the routes

of Nick Dimitris, Ken Graham, Bob Lumsden, and Warren Griglio. Harris's route changed from a suburban route with fewer accounts. high volume. and a safe route, to what he considered to be in unsafe intercity route, with a third more accounts, but the sale of one-third fewer cases. Because they were then paid on a commission, his pay suffered. Since the time his route was changed, there has been no more route bidding based on seniority at Don Lee Dearborn for pre-sell route drivers. Since then, until the date he testified, the Company had changed his route as many as nine more times.

When this change was made, the Union challenged it; and Thomas replied, by letter dated November 20:

> (U)nder the terms of the Employer's last, best. and final offer given to [the Union] on September 13, 1990 . . . the Employer is free to change routes as it deems appropriate. Please see Article 3 Jurisdiction Section 3.1(a) and Article 7 Managements Rights Section 7.1
>
> In those instances, where it is appropriate for my client to negotiate with you changes of working conditions not contained within the four corners of last, best and final offer, we will do so.

Yule wrote a similar letter 7 days later, denying the Union's grievance about the same issue.

Prior to the February implementation. the DDOM agreement contained no management-rights clause. Because Thomas relied on that clause, it is evident that he relied on the implementation that I have found was illegal. As a result, it was inappropriate for Don Lee Dearborn to change any term and condition of employment based on a clause that must be rescinded. Respondents contend that they bargained about the change with the Union, after which the Union filed a grievance. However, their principal brief misstates the date of the Union's grievance, which was not filed until the Company had already implemented the change. Furthermore, the

Company admits that it "may not have technically met its obligations." That is too weak an admission. This was not a technical violation. The Company completely avoided doing what was required of it under the Act. It was required to bargain to impasse before making any change of terms and conditions of employment. I conclude that its unilateral change of its employees' route assignments and the route-bidding procedure violated Section 8(a)(5) and (1) of the Act.

On February 19, 1992, Don Lee Dearborn driver/helper Tom Shaw returned from a delivery and pick-up with, among other returns, a stack of empty cases, "250s," which are supposed to be filled with 24 empty 12 ounce bottles.[20] Warehouse manager Ron Moeller called him over to where three palettes of cases were positioned and berated Shaw for his truck being a mess and for his bringing back cases which were not full. Moeller asked Shaw whether he could not tell the difference between a case that was filled with 24 bottles or 12 bottles or only two bottles and then he threw a case at Shaw, hitting him. (Shaw testified that it hit him in the chest and legs, that he fell to the ground, and that he was "stunned" and "bewildered." He clearly remembered that some bottles fell out. Harris testified merely that he saw the case hit Shaw in the chest, but Harris said nothing about Shaw falling over, only that "he took a step back." Harris also could not recall how many bottles fell out of the case. When asked whether two fell out, he said that he did not know, he did not count them, and he did not lift up the box.) This event prompted the Union to publish and distribute yet another leaflet, making fun of "Ron the Mauler," a play on Moeller's name.

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[20] They are called "250s" because the distributor receives 10 cents for each of the 24 bottles, totaling $2.40, plus 10 cents for the cardboard box.

The one in charge of distributing leaflets at Don Lee Dearborn was typically Harris, who earlier had been assaulted on his route, resulting in his fear of resuming deliveries. He was receiving workmen's compensation benefits and was at the same time employed by the Company on its "bridge program," which was intended to retain as useful workers its injured or disabled employees until they became well enough to return to their normal employment. Harris saw the Moeller-Shaw altercation and, as a result of being the employee who distributed this new particularly offensive piece of literature (at least, offensive to Moeller), the complaint alleges, the Company reduced his hours for approximately 3 weeks. Harris testified that he distributed the leaflet on March 6. That afternoon, Moeller told him that he was going to switch his hours. He no longer worked, as he had before, 40 hours each week. Instead of reporting at 8 a.m., he had to report at 9 a.m., instead of leaving at 4 p.m., he had to leave at 2:30 p.m. Thus, according to the General Counsel, he could not distribute any union literature, which he used to do before and after work, at times before the drivers had left and after some had returned, and when the night reclamation warehouse employees were in the parking lot. The General Counsel alleges that the change of time was imposed not only to punish Harris for the distribution of the leaflet but also to ensure that he would not be able to distribute other union literature to the other drivers.

One of the "Ron the Mauler" leaflets was posted in the routing--lunchroom on a bulletin board, where Union leaflets were regularly posted, and additional copies were left on the lunch table. Moeller removed the leaflet from the bulletin board and threw the copies of the leaflet that were on the lunch table into the trash. The complaint alleges that Moeller's removal violated the Act because it discouraged employees from engaging in the concerted and protected activities of communicating with other employees. The Company does not have the option of permitting flyers which it approves of to remain on the bulletin board (as it did

with notices of parties and union meetings. United Way appeals, business cards, vacation schedules, boat sales, fishing tournaments, and outings), but removing writings that offend it. Its defense is based on the fact that its action was unintentional: that is, that the leaflet was removed by Moeller and shown and ultimately given by him to Yule, who said that he would take care of it. Moeller assumed that Yule would replace it on the bulletin board, while Yule testified that he did not know that it had been removed from the bulletin board and so did not think to replace it.

I do not believe Moeller, who was upset by the attack on him. He removed the leaflet because he did not think that the employees had the right to publish such untruthful and vicious attacks. He made no mistake. Moeller was irate and his actions were deliberate. (As driver Robert Kullgren described it, Moeller seemed to be upset: he "[w]alked in the room, said good morning, gentlemen, snatched the papers, started to walk out, stopped, turned around, walked back to the board and ripped it off and left.") He not only removed the leaflet from the bulletin board to bring to Yule but also removed and threw away all the leaflets from the table, where Harris had left numerous copies. If his intention was only to show the leaflet to Yule, he had no need to remove the one from the bulletin board and destroy all the rest. To Moeller's claim that he was merely trying to keep the room neat and tidy so that the drivers could do their paper work, the drivers uniformly and credibly testified that they had not seen Moeller in that room before. Furthermore, even if Yule did not know where the leaflet came from, the Company is responsible for Moeller's removal of the leaflet, because the employees must have reasonably assumed that leaflets that attacked management would not be tolerated by their employer. The removal tends to discourage employees from engaging in activities protected by Section 7 of the Act and

violates Section 8(a)(l).[21] *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983); *Saint Vincent's Hospital*, 265 NLRB 38 (1982), enfd. in relevant part 729 F.2d 730 (8th Cir. 1984). Because Don Lee Dearborn has committed numerous other violations, I do not deem this violation isolated, as the Company contends.

It does not follow from my finding of a violation that the Company punished Harris for posting the flyer. Harris testified that his distribution of the leaflets and the posting on the bulletin board on March 6 was immediately followed by Moeller's change of his hours and that that was done to ensure that Harris started work after the drivers left and finished before the drivers returned. Yet two drivers, Kullgren and Mike McGowan, who saw Moeller remove the flyer, insisted that he did so on Wednesday, March 11, and that was the first day that the leaflet had been distributed. That is 5 days after Harris said that the event took place. I credit their testimony (they had no reason to lie) and, in so doing, find that the distribution of the flyer could not have been the reason that Moeller reduced Harris's hours. Rather, I find, as Moeller testified, that there was insufficient work for Harris to do. Harris had been doing "make work," work that the other employees on the bridge program were physically unable to do. For example, Harris scrubbed floors, painted, and cleaned the bathrooms and drains. Another employee, being unable to bend over or reach above his shoulder, painted only from shoulder height to his knee. Others counted cans, patrolled the parking lot, and picked up checks. No other employee was able to do what Harris was assigned to, and there is no evidence that the work that he

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[21] In addition, the flyer is not so offensive that it should have been removed. Rather, it is a humorous and almost playful leaflet, making clean fun of Moeller's temper tantrum.

had done before the reduction of his hours was performed by another.

In addition, Harris had been distributing massive amounts of literature for more than a year and had been the union steward since 1989. He filed 150 grievances, an average of 4 to 8 each month, and wore T-shirts showing his allegiance to the Union. Indeed, in 1991 and 1992, Harris leafleted and picketed outside the residences of both Don Klopcic Sr., Don Lee Dearborn's chief operating officer, and Klopcic Jr., Moeller, and Yule. Yet, the Company never disciplined him or discriminated against him or changed any term or condition of his employment. In addition, there appears to have been no reason that Harris could not have reported to his job earlier than 9 a.m. in order to leaflet the other employees, although Harris testified to his belief that the Company's rules prohibited him from staying at his job after his workday. That does not appear to have limited his leafleting activities prior to March 6. I find that there was no credible antiunion reason that Don Lee Dearborn would have wanted to punish Harris on March 6, which was just the same as any other work day. I find that the General Counsel never proved a prima facie case that Don Lee Dearborn took action against Harris for any activity protected by the Act and that, in any event, the Company proved beyond doubt that it reduced his hours for legitimate reasons and not for reasons which violated the Act. *Wright Line,* 251 NLRB 1093 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Corp.,* 462 U.S. 393(1983).

Another allegation of the complaint related to warnings that Powers gave to its drivers. For years, Powers had certain policies concerning drivers' duties to pick up empty beer cans. They were either returned in boxes of 24 or in a plastic bag which was supposed to hold 192 12-ounce cans, for which Powers would credit the customer $19.20 against its bill. The bag was either clear or translucent, and most

were marked with a line near the top. That should have indicated when approximately 192 cans were placed in the bag, but that number still might not be in the bag, due to the inclusion of larger cans or bottles or even foreign objects to make the contents appear greater than they were. Powers directed that the drivers not count the cans at the customers' premises because counting wasted too much time and caused them to miss making deliveries to other customers.

Prior to July 1992, Powers' policy was unclear. In some instances, supervisors directed the drivers, when given bags that were short, to advise their supervisors of what was happening and have the cans counted at Powers' premises. In other instances, a driver advised his customer to fill the bag better and reported the conversation to his supervisor. Often, the driver's supervisor told the driver that he would talk directly with the customer because the customer was a large customer and the supervisor did not want to get it upset. The supervisor would then threaten the customer that the bags would no longer be picked up, but then the supervisor would tell the driver to pick up the bags anyway. At best, the advice to the drivers was conflicting, but there is no dispute that Powers never disciplined any drivers, even though they continued to bring back inadequately filled bags, or enforced any related rule in its drivers' handbook.

In 1992, Powers began to realize that its customers were taking enormous advantage of it. It was crediting them with vast amounts of money for the return of cans that were not being returned. It decided to enforce its rule. At a drivers' meeting in June 1992, Delivery Manager Don Bishop advised the drivers that starting immediately they were required to tag bags, that is, they were to attach a paper tag to each bag that they picked up with the customer number on it and their driver number. Before then, they did not have to use identification tags. On July 1, Bishop told the drivers that they would now be required to make sure the, bags were filled with the proper amount. The drivers were allowed a

shortage of no more than 5 percent, and they would face discipline if they violated that rule. Beginning in July, Powers began to randomly and selectively audit the number of cans being returned. It finally purchased a can counter and began to count all the bags brought back. If the total of the cans was more or less than 5 percent of the total number that it had credited its customer, it disciplined the driver. From August to November 1992, Powers issued warnings for violation of the empty pick up rule to Butch Callahan, Daniel Pickett, Thomas Jackson, Lynn DeMay, David Moody, Robert Golding, Greg Sheldon, Mike Thornberry, John Oestrick, Randy Spicer, Bud Goike, Chad Gardner, and Jim Marks. The complaint alleges that these warnings violated the Act because discipline had never been imposed before, and Powers had a responsibility to discuss with the Union its desire to mete out discipline before it could begin to do so.

Powers claims that the Union waived or otherwise relinquished its right to bargain over the discipline that it imposed on its drivers because the Union "was aware of Powers' Standard Operating Procedure for 'Empty Pick-Ups' as early as July, 1990" and that "on November 18, 1991 the Union was given *actual* written notice of Powers' intention to enforce the procedure through corrective disciplinary action." The Company further contends that "in April 1992 the Union received notice of Powers' implementation [and in] June, 1992 when the parties met to discuss work rules, the Union failed to object or voice any concern over the policy." The arguments fail, because there is no record support that Powers ever advised the Union that it intended to enforce anything with disciplinary action. There was no new policy. The only written notice that Powers sent the Union on November 18, 1991, were rules, most of which Powers represented were already in effect and were merely rewritten for clarity. The six paragraphs under the heading "EMPTY PICK-UP" are identical to those previously in effect; and a new paragraph, headed "EMPTY LOADING," was added, but that was not the writing under which Powers

meted out its discipline. Otherwise, Powers offered nothing to support its claim that the Union had notice that Powers disciplined employees in the past or was going to discipline employees in the future. The record is similarly barren of proof that Powers consulted with the Union about its plan to begin a new policy and enforce its empty can policy with discipline. I conclude that Powers violated Section 8(a)(5) and (1) of the Act. *NLRB v. Katz,* 369 U.S. at 747; *Great Western Produce.* 299 NLRB 1004 (1990); *Hyatt Regency Memphis,* 296 NLRB 259, 263-264 (1989), enfd. in relevant part 939 F.2d 361, 372-373 (6th Cir. 1991).[22]

Finally, on December 6, at the negotiating table, in support of his argument that Respondents were entitled to some movement at the bargaining table from the Union, Long stated that personalities should not be a part of the negotiations. He then proceeded to make them exactly that. He complained that the Union's proposals of packages were not making any progress, nor was its proposal to limit the negotiations to only those matters that the parties had labeled as key issues and that the Union's conduct was no better than its corporate campaign. He began to talk about how upset the Companies were with a number of the Union's demonstrations, and he cited the Union's protest, in the form of a mock wedding, outside the church at which Bob Baetens' son was getting married. Knox said: "Well, I thought that, you know, that they told us nobody was upset." Long replied: "You're damn right they were upset. There were a lot of people that were upset. Not just on that, on a lot of things." He added, according to the General Counsel's witnesses: "In fact, two of the distributors . . . told me they'd had have you killed if they could get away with it." Later in

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[22] Respondents' attempt to distinguish *Hyatt Regency* because it "does not involve a failure to bargain" is erroneous. The Board wrote, at p. 263: "[W]hen the Respondent unilaterally implemented this change in practice, it violated Section 8(a)(5) and (1) of the Act."

the meeting, Long called Knox an epithet, and a physical altercation between the two was narrowly avoided.

Long denied that he made the threat. Rather, he testified that he said "I would not be surprised if some of the owners wouldn't like to kill you [Knox] if they thought that they could get away with it." He also said that he said it without raising his voice and in a conversational manner, all of which I find incredible. This was a hard and difficult meeting. There was nothing low-key about it. All witnesses agree that Long was angry that day, and there was testimony of several expletives. Furthermore, Long impressed me as the very type who would lose his temper, as he did during the hearing, or say things that he later regretted, as was evident even in some of the comments he made during the hearing as attorney for Herbert. (One time he even loudly cursed, and I had to reprimand him for doing so.) All told, the threat is consistent with his temperament, and I find that he said it. Respondents further contends that it was not taken seriously by Knox. Although I was greatly troubled by Knox's ability to recall accurately various events to which he testified, and it may be that he amplified on his fears resulting from Long's statement, nonetheless one does not make statements about killing someone else. The mere mention of "killing," in the presence of the employee-negotiators, imparts the fear of physical harm to those who engage in the protected activity of representing employees as their collective-bargaining agent. Long is an attorney and presumably knows his clients. Indeed, even if I found that Long only speculated about the actions of his clients, I would still find a violation. He is in a position to express their thoughts and feelings, as he does during negotiations. This wholly inappropriate statement raises a specter of fear of physical harm to a representative of the employees. That is prohibited conduct under Section 8(a)(1) of the Act.

The unfair labor practices found herein, occurring in connection with the Respondents' businesses, have a close,

intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in various unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order that all Respondents, except West Coast, rescind the February 7 and April 15, 1991 implementations of the last, best, and final offers and restore all terms and conditions of employment to the status quo before the unilateral changes, to the extent that such were detrimental to its employees. That includes eliminating the new casual employee classification and probationary employee clause and making whole those employees who were affected by Respondents' illegal implementations. I shall also order Respondents to make all unit employees whole for any loss of wages and benefits they may have suffered as a result of the unlawful changes. Backpay shall be computed in the manner prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), with interest as set forth in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). If Respondents did not contribute to employee benefit funds, interest shall be paid as prescribed in *Merryweather Optical* Co., 240 NLRB 1213, 1216 fn. 7 (1979). Respondents shall also make whole employees for the implementation of a wage rate inconsistent with their last offers to the extent that the employees were harmed thereby, with interest. If employees lost coverage for various benefits, I shall order Respondents to reimburse them for any expenses incurred as a result of Respondents' failure to permit them coverage, as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cit. 1981). Don Lee Dearborn and Don Lee Warren shall also make whole all employees

who had to perform bulk routes and were paid different rates, to the extent that the employees were harmed. Respondent Don Lee Dearborn shall also make whole those drivers and warehouse employees who were on layoff status at the time when it unilaterally assigned casual employees to perform warehouse and driving work and at times other than those provided in its last, best, and final offer and it shall also make whole those of its regular employees whom it terminated when their layoff status was extended for more than six months by reason of the employment of casual employees. Had it not been for the violation of the Act, they might not have been discharged. Accordingly, they are entitled to immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to be made whole for any loss of wages and other benefits they may have suffered by reason of Don Lee Dearborn's discrimination against them, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest. Don Lee Dearborn shall similarly make whole those employees who were detrimentally affected by its unilateral change of their route assignments and route bidding procedure in the manner prescribed in *F. W. Woolworth Co.*, rescind its new policy, and restore the old policy. Finally, Powers, without consultation with the Union, issued warnings to its employees for failing to abide by its rules that it had not enforced. I shall order Powers to remove that discipline from the employees' personnel files of Butch Callahan, Daniel Pickett, Thomas Jackson, Lynn DeMay, David Moody, Robert Golding, Greg Sheldon, Mike Thornberry, John Oestrick, Randy Spicer, Bud Goike, Chad Gardner, and Jim Marks and notify them of its action.

[Recommended Order omitted from publication.]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DON LEE DISTRIBUTOR, INC. (WARREN), ET AL.,	)
Petitioners/Cross-Respondents,	)
v.	)
NATIONAL LABOR RELATIONS BOARD,	)
Respondent/Cross-Petitioner,	)
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL, 1038,	)
Intervenor.	)

BEFORE: BOGGS, NORRIS, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated to the

original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

July 10, 1998

/s

Leonard Green, Clerk

Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b) (1988):

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

NOTICE TO EMPLOYEES AND MEMBERS

POSTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY A REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain in good faith with Hubert Distributors, Inc., with respect to drug testing and other mandatory subjects of bargaining, by failing to respond, for excessively long periods of time, to bargaining requests, and by failing to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment for the employees we represent in the bargaining unit described below.

WE WILL NOT, in any like or related manner, fail and refuse to bargain with Hubert regarding the bargaining unit described below.

WE WILL meet at reasonable times and confer in good faith with Hubert with respect to wages, hours, and other terms and conditions of employment for the employees employed in the following bargaining unit, and we will, upon request, execute a written contract incorporating any agreement reached:

> All full-time and regular part-time driver-salesman (sic), helpers, warehouse employees, forklift drivers, hand loaders, reclamation employees and breaker pile employees employed by Hubert at its Pontiac, Michigan, facility; but excluding all other employees, professional employes (sic), office clerical employees, guards and supervisors as defined in the Act.

LOCAL 1038, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

(Charged Party)

Dated: 1/14/93 BY: /s/ Robert E. Knox

(Representative) President (Title)

LOCAL UNION No. 1038

affiliated with the

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

2741 Trumbull Avenue / Detroit, Michigan 48216 / Phone 964-0720

June 15, 1990

Fred Long
West Coast Industrial
Relations Association
170 Knowles Drive
Los Gatos, California 95030

Dear Mr. Long:

In order to better prepare for the more substantive bargaining session forthcoming on June 21, 1990, please see the request, listed below, for information which we submit and ask that the Companies promptly provide in writing the specifics outlined in the request herein.

1. Complete OSHA 200 logs covering the workplaces for 1987, 1988 and 1989.
2. All reports, memos, studies or other documents concering (sic) noise, dust, and pesticide levels in the workplaces for 1987, 1988 and 1989. This is to include results of tests performed, and information resulting from work performed by internal and/or external consultants employed by the Company.
3. All current Material Safety Data Sheets covering chemicals, solvents, pesticides, etc. used in the workplaces.
4. All other reports or studies the Company or its agents may have produced concerning safety conditions in the workplaces during 1987, 1988 and 1989.

5. A summary of the number and types of injuries and illnesses occuring (sic) within the plant which were covered by Workers Compensation during 1987, 1988 and 1989.
6. Copies of the Company's safety policies and rules in force, and training materials currently used.
7. Copies of Safety Committee meeting minutes for 1987, 1988 and 1989.

If the information is not applicable, available, or otherwise not available at this time, please provide us a detailed written response and explanation immediately with details.

Sincerely,

Robert E. Knox
President

REK/sb

LOCAL UNION No. 1038

affiliated with the

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

2741 Trumbull Avenue / Detroit, Michigan 48216 / Phone 964-0720

June 18, 1990

Fred Long
West Coast Industrial
Relations Association
170 Knowles Drive
Los Gatos, California 95030

Dear Mr. Long:

In order to better prepare for the more substantive bargaining session forthcoming on June 25, 1990, please see the attached request for information which we submit and ask that the Companies promptly provide in writing the specifics outlined in the request herein.

1. Please provide any available information or copies of records maintained independently or derived from the Company's health insurance programs which describe the nature of employee health insurance claims. This includes any analysis performed by either your company or your insurance carrier of this claim's experience, including any financial analysis. In particular, provide any analysis of health insurance claims which describe either the costs or the incidence of any specific health disorders (such as back injuries or other muscular-skeletal disorders, etc.)

2. Provide a description of all disability claims by bargaining unit members during the past 3 years, including:

   (a) Name, age, date of hire and date of disability.

   (b) Job title at time of disability (and during previous year, if available).

(c) Employee's average earnings at time of disability.

(d) Length of disability.

(e) If disability involved surgery, provide:

1. total cost of surgical procedure.

2. amount of applicable surgical benefits paid to employee.

(f) Without revealing individual employees' names, provide the nature of the injuries or health problems which occasioned these claims, including the ICD-9 code numbers if available.

If the company or your insurance carrier conducts any other analysis of health insurance claims experience such as lengths of hospital-stays or disability for specific health disorders, please provide a copy of such analyses, including a list of all specific health disorders or diagnosis codes.

3. Please provide information regarding the Workers' Compensation Insurance programs, including the financial experience for 1987, 1988, and 1989 and any analysis by the insurance carriers of this experience, especially in regard to particularly costly injuries and illnesses. Also, please provide a description of all occupational illness claims during 1987, 1988, and 1989 for current or former employees.

Also please include the following items regarding claims for occupational injuries:

(a) Name, age, date of hire and date of disability.

(b) Job title at time of disability (and during previous year, if available).

(c) Employee's average earnings at time of disability.

(d) Length of disability.

(e) Nature of disability.

(f) Disposition of claim (paid, denied and pending, or denied and closed).

(g) Amount of payments made, including medical payments; specify costs of surgery separately.

(h) Cost to company for legal representation during processing of claims denial.

4. Please provide a description of the company's ergonomic hazards, including any efforts to redesign those operations in order to reduce these hazards. In addition, we would like to receive a copy of the Company's medical policy on Carpal Tunnel Syndrome.

Please indentify (sic):

(a) Any consultants contacted or used.

(b) Any documentation of the impact of ergonomic job-design changes on either the productivity or the earnings of the operators in question.

5. Please provide a copy of the Company's Written Hazard Communication Program, including the list of hazardous substances. In addition, please provide copies of material safety data sheets (MSDS) for each hazardous chemical used by the Company. Also copy of education and training program for workers exposed to hazardous substances.

Testimony of Thomas Vella

Q. Okay. And Mr. Long responded that the parties have agreed on the issues, but there may be exceptions, is that correct?

A. Uh, correct. And that whether we had a mutual aid pack was none of his business.

Q. All right. Mr. Long also told Mr. Knows that the distributors could also retain someone else without penalty?

A. I don't recall that.

Q. I've handed you your handwritten bargaining notes for March 27th, 1990.

Would you read through the first page and tell me whether Mr. Long made that statement?

A. Yeah, the --

Do you want me to read the notes, or just recall from the --

Q. No. Put the notes down.

A. Okay.

Q. And my question is, Mr. Long told Mr. Knox that the distributors could retain someone else without penalty, is that correct?

A. I don't recall that being said.

Q. And has reading your notes refreshed your recollections?

A. No, it hasn't.

Q. Would you agree with me that that statement is contained in your notes?

A. Yes, I will.

Q. You wouldn't have written down something that wasn't said would you, Mr. Vella?

MR. LONG: Objection.

JUDGE SCHLESINGER: What basis?

MR. LONG: I'm sorry. Objection to the form of the question.

JUDGE SCHLESINGER: No. He can answer as to what his normal practice is.

THE WITNESS: My normal practice is to write down what was said.

Whether I would write on these notes something that wasn't said, say a though that I was having at the time, it's possible.

But I'm not implying that that's what that is.

BY MS. PAPPAS:

Q. Would you agree with me, Mr. Vella, that your notes say, "Fred said that they can retain someone else without penalty."?

A. Yes.

Q. Mr. Vella, you attended the second bargaining session on April 18th, 1990?

A. I believe I did.

Testimony of Robert Knox

A. Uh, yes, it was.

Q. All right. Did you have a response to this proposal at that time?

JUDGE SCHLESINGER: Which – what are you referring to now?

MS. PAPPAS: I'm sorry. The handwritten one.

A. (continuing) I told them we agreed with, you know, those adjustments because it addressed our needs.

Q. Mr. Knox, do you recall whether or not there were any requests made by the Union concerning documents at this bargaining session?

A. Yes.

Q. Will you tell us what was said and by whom?

A. Steve Wolak, the attorney we had at the table with us, asked if the Employers – said that he wanted any doc – agreement that the Employers had between themselves, uh, binding themselves, or anything that would be of mutual aid

or anything like that. He said that we needed it if we were going to be able to negotiate, that we had to know if there was any restrictions or any limitations, uh, among the parties.

Q. Mr. Knox, your testimony was that the Union had made several requests for this document over the course of negotiations, that the Employers had – I believe your testimony was that the Employer had – either told you they weren't aware of such a document or they wouldn't respond to your questions or that it didn't exist.

Why after a year-and-a-half of negotiations, were you still asking about such a document?

A. Well, I still had in my mind that back in '87 that there was this power of attorney which really was much more than just a power of attorney. It actually was an agreement that tied the distributors together and showed what leverage they had on each other, how they would make their decisions, uh, what kind of pressure whey could put upon to each other, and, uh, I felt that by the actions through the course of

negotiations that, you know, that they were, in fact, tied together and not able to make individual decisions.

And then more recently when – it was just a meeting or two before that when – we had met with Eastown and we had already been under the implemented offer so we had a chance to get an appraisal as to what the Employers really needed out of any – what they claimed they didn't want any restrictions – and as I was asking Jim Quasarano, you know, uh, uh, how many, you know, what's your trucks selling now, now that you haven't got a load limit now that you have imposed that.

And realizing that almost everybody had under – in his place was selling within the area that we had out there, uh, that on the curfews – most of the people were getting in within the curfews and just a few over and when they did get over it was still within range that, you know, we could have talked about.

And we talked about the coolers where there was two out of I don't know how many hundreds of coolers that they

made adjustments on. And, uh, starting times where they were, you know, within the range of what we were offering.

And I thought to myself, you know, with the offer that we have on the table; with what they are experiencing, why don't we get an agreement with Eastown. Or at least to the point of saying, you know, with these minor adjustments, these tune-ups, we are going to have an agreement.

And it was very clear to me that they just could not make the decision for themselves. They were, in fact, you know – well, marching in lock step really because Cris Thomas kept saying they all wanted – they had the same everything else and we were getting no place with them. So I figured that they had to have some sort of document that bound them together. And we wanted to know what the conditions were so we could try to formulate our negotiations and create something.

Supreme Court, U.S.
FILED
DEC 9 1998
CLERK

No. 98-594

In the Supreme Court of the United States

OCTOBER TERM, 1998

DON LEE DISTRIBUTOR, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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JOHN EMAD ARBAB
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Washington, D.C. 20570

QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's finding that a portion of the unfair labor practice complaint, alleging that petitioners had engaged in unlawful joint bargaining without the Union's consent, was timely under Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	12
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Dayco Corp. v. *Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975)	14
District Lodge 64, IAM v. *NLRB*, 949 F.2d 441 (D.C. Cir. 1991)	14
Don Lee Distrib., Inc. v. *NLRB*, 145 F.3d 834 (6th Cir. 1998)	4
Fitzgerald v. *Seamans*, 553 F.2d 220 (D.C. Cir. 1977)	14
General Elec. Co. v. *NLRB*, 412 F.2d 512 (2d Cir. 1969)	9
Herb v. *Pitcairn*, 324 U.S. 117 (1945)	13
Hill v. *United States Dep't of Labor*, 65 F.3d 1331 (6th Cir. 1995)	14
IAM, Dist. Lodge 64 v. *NLRB*, 50 F.3d 1088 (D.C. Cir. 1995)	14
Landry v. *Air Line Pilots Ass'n Int'l*, 901 F.2d 404 (5th Cir.), cert. denied, 498 U.S. 895 (1990)	14
NLRB v. *O'Neill*, 965 F.2d 1522 (9th Cir. 1992), cert. denied, 509 U.S. 904 (1993)	14
NLRB v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958)	7-8
Redd-I, Inc., 290 N.L.R.B. 1115 (1988)	13
Truck Drivers & Helpers Union, Local No. 170 v. *NLRB*, 993 F.2d 990 (1st Cir. 1993)	14

Cases—Continued: Page

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 15

Utility Workers Union, Local No. 111 (Ohio Power Co.), 203 N.L.R.B. 230 (1973), enforced, 490 F.2d 1383 (6th Cir. 1974) 8

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

§ 8(a)(5), 29 U.S.C. 158(a)(5) 5, 7, 9

§ 9(b), 29 U.S.C. 159(b) 2

§ 10(b), 29 U.S.C. 160(b) 9, 11, 12, 13, 17

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-594

DON LEE DISTRIBUTOR, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 145 F.3d 834. The decision and order of the National Labor Relations Board (Pet. App. 24a-39a) and the decision of the administrative law judge (Pet. App. 40a-105a) are reported at 322 N.L.R.B. 470.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1998. A petition for rehearing was denied on July 10, 1998 (Pet. App. 106a-107a). The petition for a writ of certiorari was filed on October 8, 1998. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners are six wholesale beer distributors operating in the Detroit, Michigan, metropolitan area. Pet. App. 3a, 41a. Petitioners' employees are represented by Respondent Local 1038, International Brotherhood of Teamsters (Union). The workforce employed by each petitioner constitutes a separate bargaining unit under Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b). Pet. App. 3a, 42a-44a. In January 1990, petitioners withdrew from a multiemployer association and retained West Coast Industrial Relations Association, Inc. (West Coast), a labor-relations consulting firm, as their bargaining representative. *Id.* at 3a-4a, 25a n.2, 26a, 43a-44a. Fred Long, an official of West Coast, advised petitioners to enter into a "mutual aid pact." *Id.* at 4a, 44a. Accepting this advice, petitioners signed a mutual aid pact on January 18, 1990. That pact provided, in relevant part:

> 1. Each Distributor shall enter into its own Agreement with the Union. Nothing contained herein shall be construed to reflect a multi-employer association nor create a multi-employer unit. This document reflects a coordinated bargaining effort among individual and independent Distributors.
>
> 2. Each Distributor shall share costs and expenses of Fred R. Long and his associates who shall represent the Distributors['] bargaining efforts with the Union . . .
>
> * * *

> 7. Distributors agree to the establishment of the minimum objectives * * * for a new Collective Bargaining Agreement which can only be changed by a majority vote of the participating Distributors.
>
> 8. In the event any Distributor is in breach of this Agreement or negotiates directly with the Union * * * or agrees to settle on terms and conditions in excess of those listed in item 7 herein above, that Distributor * * * shall * * * pay to each of the other Distributors a penalty fee of $400,000 to each.

Id. at 4a-5a, 6a, 44a-45a, 48a. Among the 22 "minimum objectives" for a new collective bargaining agreement referred to in paragraph 7 of the mutual aid pact were such matters as "[e]liminate eight (8) hour minimum/maximum day," "[r]emove load limit," "[m]anagement rights clause," "[r]eduction in wages," and "[n]o restrictions on number of part-time employees." *Id.* at 5a-6a, 27a, 45a-47a.

b. The existing collective bargaining agreement was scheduled to expire on May 1, 1990. Pet. App. 6a, 44a. On March 6, 1990, Patrick Jordan, an attorney for West Coast, informed Robert Knox, president of the Union and its chief negotiator, that petitioners were "prepared to meet with you jointly and engage in concurrent negotiations." *Id.* at 67a; see also *id.* at 6a. Knox replied that he had not agreed to meet jointly or to engage in concurrent negotiations with petitioners and that he did not "even know what that meant." *Id.* at 6a, 67a.

The parties held an initial meeting on March 27, 1990. In view of the expressed reluctance of Knox to participate in "joint" or "concurrent" bargaining, Long told Knox that he could conduct a bargaining session for one of the distributors separately but would thereafter

insist on identical contract terms for each of the other five. Pet. App. 7a, 68a; see also *id.* at 79a. Knox instead agreed to try the joint bargaining approach and "see how it progressed." *Id.* at 7a, 68a.

At the March 27 meeting, Knox asked Long whether petitioners had entered into any kind of mutual aid pact. Pet. App. 7a, 54a. Long replied that the possible existence of a mutual aid pact was "none of his business and that it was not relevant to bargaining." *Ibid.* Long also stated that petitioners had not pledged to negotiate exclusively through him and that they could "retain someone else without penalty." *Id.* at 7a, 56a-57a.

The parties exchanged initial contract proposals on April 18, 1990. Long presented the Union with six identical proposals, one for each distributor. Pet. App. 7a. That circumstance prompted Knox to ask whether there was "an association or other collective understanding" among petitioners. 145 F.3d at 839[1]; see also Pet. App. 54a. Long refused to answer, stating that "that wasn't an appropriate subject for bargaining." Pet. App. 7a, 54a. When the question again arose at a May 22 negotiating session, Long gave a "somewhat evasive answer" which suggested that "certain [d]istributors could well end up agreeing to different contract terms." *Id.* at 8a.

At bargaining sessions held in late June and early July 1990, the Union began to insist on separate bargaining for each distributor. Pet. App. 8a, 68a-69a, 82a-83a. When the Union made proposals that addressed issues unique to two of the distributors, however, all six distributors responded with identical counter-

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[1] The cited passage from the officially reported decision of the court of appeals has been omitted in the printing of the appendix to the petition. See Pet. App. 7a.

proposals. *Id.* at 8a-9a, 79a-80a. On August 8, Knox asked Chris Thomas, an associate of Long, for all documents showing the relationship between West Coast and petitioners. Thomas refused to honor that request, stating that the documents were confidential. *Id.* at 9a, 54a.

On September 11, 1990, West Coast transmitted to the Union a "final offer" which made clear that petitioners were presenting "complete and identical" offers. Pet. App. 9a. At the next bargaining session on September 20, Knox asked whether there was "a written or oral document that binds you distributors together in any way." Officials of two distributors stated in response that there was no pact of any kind among petitioners. *Id.* at 9a, 54a.

On January 14, 1991, after several further unsuccessful bargaining sessions, Thomas sent a letter to Knox stating that negotiations were at an impasse. Pet. App. 9a-10a. On January 30, petitioners simultaneously notified the Union that they would unilaterally implement the non-economic portion of their final offer on February 7, 1991. *Id.* at 10a. Petitioners thereafter did so on that date. *Id.* at 48a.

c. On April 3, 1991, the Union filed a charge with the National Labor Relations Board alleging that petitioners had violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by bargaining in bad faith and by unilaterally implementing new terms and conditions of employment on February 7, 1991, in the absence of a bargaining impasse. Pet. App. 11a-12a, 40a-41a n.1, 48a.

On June 20, 1991, after an investigation, the Regional Director declined to issue a complaint against petitioners based on a theory that they had bargained in bad faith by engaging in multiemployer bargaining

without the Union's consent. Pet. App. 12a, 49a. On the evidence then before him, which did not include the mutual aid pact, the Regional Director found "no evidence that the Employers wished to change the scope of the six individual units or combine them into one unit," and "[no] evidence that, in the event an overall agreement is reached * * * the Employers intend not to bargain individually over issues which might pertain to each respective company." *Id.* at 12a. Instead, the Regional Director found that petitioners had engaged in permissible "bargain[ing] in a group with a single representative of their choice * * * for identical language in their collective bargaining agreement." *Ibid.* The Regional Director did issue a complaint against petitioners, however, alleging that the February 7, 1991, unilateral changes had been implemented in the absence of a bargaining impasse. The complaint was issued on July 26, 1991. *Id.* at 13a, 49a.

In the meantime, on July 12, 1991, the parties conducted another bargaining session. Steve Wolock, a Union attorney, asked for the production of any document "that spelled out the employers' relationship to each other for purposes of collective bargaining." He also specifically asked whether "there were any penalty provisions amongst the distributors." Pet. App. 10a, 54a. Thomas admitted for the first time that there was an agreement among the distributors, but he declined to produce it on the ground of attorney-client privilege. *Id.* at 10a, 54a-55a.

The Union appealed the Regional Director's refusal to issue a complaint against petitioners based on an unlawful multiemployer bargaining theory. On July 6, 1992, Long wrote a letter to the Board's Office of Appeals in which he stated that, while petitioners had entered into a "mutual aid pact," the pact was solely for

the purpose of sharing the cost of negotiations and contained no provision "that would restrict their bargaining." The Office of Appeals subsequently denied the Union's appeal. *Id.* at 13a, 49a-50a.

d. On November 16, 1992, a hearing on the July 1991 complaint commenced before an administrative law judge (ALJ). Pet. App. 14a, 40a-41a n.1. On that date, in response to a subpoena, petitioners produced a copy of the mutual aid pact for the first time. *Id.* at 14a, 48a, 50a. Shortly thereafter, on January 27, 1993, the General Counsel moved to amend the complaint. *Id.* at 14a; C.A. App. 104. The proposed amendment to the complaint alleged that the mutual aid pact, "which was concealed from the Union, was actually an agreement forming a de facto multi-employer association and/or bargaining coalition and * * * from March 27, 1990, the first negotiating session, [petitioners] bargained illegally as a multiemployer association or engaged in coalition bargaining, without the Union's consent." Pet. App. 14a, 50a (internal quotation marks omitted). Over petitioners' objection, the ALJ granted the General Counsel's motion to amend the complaint. *Ibid.*

2. a. After the hearing, the Board concluded that petitioners violated Section 8(a)(5) of the Act "by engaging in joint bargaining without the Union's knowledge or consent." Pet. App. 26a-29a; see also *id.* at 64a-85a. The Board explained that "[i]t is a violation of the statutory bargaining obligation for either a union or an employer to insist to impasse on a nonmandatory subject of bargaining, i.e., a subject that does not concern the terms and conditions of employment in the bargaining unit to which the employer's recognitional obligation extends." *Id.* at 27a-28a (citing *NLRB* v.

Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958)). The Board observed:

> Change in the scope of a bargaining unit is a nonmandatory subject. When either employers or unions which have in the past bargained in separate units begin, without the consent of the other side, to bargain jointly as if bargaining for a single contract, they are engaging in unlawful insistence on a nonmandatory subject. "Neither an employer nor a union is free to insist, as a condition of reaching an agreement in one unit, that the negotiations also include other units, or that the terms negotiated in the first unit be extended to other units."

Id. at 28a (quoting *Utility Workers Union, Local No. 111 (Ohio Power Co.)*, 203 N.L.R.B. 230, 238 (1973), enforced mem., 490 F.2d 1383 (6th Cir. 1974)). Applying these principles, the Board found that "the secret pact of the [petitioners] created a system, enforced by substantial financial penalties, by which the votes of the [c]ompanies outside a particular bargaining unit could block agreement on a contract by the bargaining parties in that unit." Pet. App. 28a.[2] The Board rejected, as inconsistent with "the credited evidence," petitioners' contention that "they were * * * engaged in lawful coordinated bargaining–i.e., each employer making its own entirely independent decision on contract terms,

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[2] The Board explained: "Because deviation from the [22 "minimum"] objectives [in the pact] could be achieved only by a majority vote, three [c]ompanies could veto another company's contract, and enforce this veto with the agreed-on financial penalty. By entering into the pact, therefore, each [c]ompany effectively lost its freedom to make the ultimate decision regarding provisions of its contract with the Union, ceding that decision to the other [c]ompanies as a group." Pet. App. 27a.

although coordinating its negotiations with the other employers." *Id.* at 26a.[3]

Because "the bargaining was unlawful from its inception," the Board concluded that "all subsequent unilateral implementations of the [petitioners'] offers were unlawful and must be rescinded." Pet. App. 29a. The Board therefore ordered petitioners, among other things, to "[r]escind the entire February 7, 1991 implementation," and to "[m]ake all unit employees whole for any loss of wages and benefits they may have suffered as a result of the unlawful changes." *Id.* at 31a.

b. The Board further rejected petitioners' contention that the amendment to the complaint alleging unlawful joint bargaining was time-barred by Section 10(b) of the Act, 29 U.S.C. 160(b).[4] Pet. App. 29a-30a; see also *id.* at 50a-56a. The Board found that the amendment was timely because it was "closely related to the [Union's] charge allegation of unilateral implementation before impasse (which became a part of the complaint)." *Id.* at 29a. The Board explained that "the joint bargaining allegation is of the same class of violation in that it concerns negotiating conduct governed by Section 8(a)(5) of the Act; it involves the same factual setting and sequence of events, in that all the theories call for analysis of the entire course of bargaining; and

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[3] In contrast to joint bargaining, "coordinated bargaining" is a lawful practice whereby "parties share information and coordinate efforts but ultimately retain the authority to negotiate contract terms individually." Pet. App. 16a. See, *e.g.*, *General Elec. Co.* v. *NLRB*, 412 F.2d 512 (2d Cir. 1969).

[4] Section 10(b) provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. 160(b).

the [petitioners] raised virtually the same defenses." *Ibid.*

The Board also found that "the amendment was appropriate for the additional reason that the [petitioners'] fraudulent concealment of the existence of the pact tolled the [Section] 10(b) period." Pet. App. 30a. The Board, by adopting the ALJ's findings (*id.* at 25a), explained that, "for 16 months, until July 12, 1991, and even as late as July 6, 1992, when Long wrote to the Office of Appeals, [petitioners] concealed the existence of the pact." *Id.* at 55a. The Board further explained that, "even if [petitioners] had somehow hinted at the existence of the pact * * * Long and his cohorts certainly never gave any clue about its contents. The Union never knew, nor did the General Counsel." *Ibid.* The Board added:

> No one knew that the pact prohibited each of [petitioners] from bargaining directly with the Union or agreeing to terms and conditions which did not meet the minimums. No one knew that, if one [c]ompany strayed from what the others wanted, it subjected itself to damages of at least $1,600,000. * * * And no one knew that Long's letter to the Office of Appeals misstated that the pact did not "restrict" [petitioners'] bargaining and that the pact related only to "sharing costs to pay [for] negotiations [and] security protection if a strike occurred."

Id. at 55a-56a.

3. The court of appeals enforced the Board's order. Pet. App. 1a-23a. The court found that, "[o]n this record, there is at least substantial evidence—we would be more likely to call it overwhelming evidence—that the [petitioners] were engaged in unlawful multiemployer bargaining without the Union's consent." *Id.*

at 18a.[5] The court rejected petitioners' contention that "the Pact * * * reflected only an innocent coordinated-bargaining strategy." *Id.* at 17a-18a.

On the Section 10(b) issue, the court concluded that "the NLRB has shown substantial evidence" that the joint-bargaining amendment to the complaint was "closely related" to the Union's April 3, 1991 charge alleging that petitioners unilaterally implemented new employment terms before a bargaining impasse. Pet. App. 20a-21a. The court also concluded that "the facts could scarcely be stronger in support of the NLRB's finding" that the "[petitioners] fraudulently concealed the terms of the Pact." *Id.* at 21a. The court found that "[t]he Union repeatedly asked about the existence of a mutual aid pact, beginning with the very first collective bargaining session," but that "[t]he [d]istributors' responses were generally evasive * * * and were sometimes downright untruthful." *Ibid.*

The court further concluded that, "[e]ven were we inclined to accept the [petitioners'] argument that the Union was on notice of the *existence* of some agreement, the record makes absolutely plain that the [petitioners] kept the *terms* of the Pact a closely-held secret." Pet. App. 21a. The court explained that "the Union had no way to ascertain whether the Pact provided for lawful coordinated bargaining or unlawful multiemployer bargaining without knowing its precise terms." *Id.* at 22a; see also *id.* at 10a-11a n.3. The court observed:

> Not only did the [d]istributors go so far as to ignore a subpoena in another proceeding demanding pro-

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[5] The court of appeals used the term "multiemployer bargaining" as a synonym for "joint bargaining," which was the term used by the Board in its decision. See Pet. App. 16a.

> duction of a copy of the Pact, but Long and his associates flagrantly misrepresented the Pact's terms—going so far as to say, for example, that there was no penalty to any [d]istributor for negotiating directly with the Union, or for using a negotiator other than West Coast * * * when the Pact clearly prohibited such acts on pain of a substantial financial penalty.

Id. at 21a-22a. "In the face of these facts," the court rejected, as "border[ing] on the disingenuous," petitioners' argument that "[t]he Union and the General Counsel failed to exercise due diligence." *Id.* at 22a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Contrary to petitioners' contention, this case does not ultimately present "the question of whether the 'fraudulent concealment' exception to Section 10(b) is limited to instances in which a charging party exercises reasonable diligence in its own behalf" (Pet. 11-12). Instead, as petitioners indirectly acknowledge (Pet. 9-10), and as the court of appeals expressly held (Pet. App. 20a-21a), the amended complaint was timely regardless of fraudulent concealment because "it was closely related to the original charge's allegation of unilateral implementation of employment conditions before a bona fide impasse was reached" (*id.* at 20a).

The fraudulent concealment doctrine was only an alternative basis for the holding of the court of appeals that the joint-bargaining allegation of the unfair labor practice complaint was timely under Section 10(b) of the Act. The court of appeals (like the Board) expressly

found that the joint-bargaining allegation was timely under Section 10(b) because it was "closely related" to the charge that petitioners unilaterally implemented new employment terms prior to an impasse in bargaining. Pet. App. 19a-22a, 29a-30a. Petitioners state that they "do not challenge this holding" (Pet. 10) and do not present this "closely related" issue as a question for review (see Pet. i).[6] Since this alternative, independent ground for the decision below is not challenged here, further review is not warranted because a judgment of this Court on the fraudulent concealment issue would not alter the ultimate disposition of this case. This Court sits "to correct wrong judgments, not to revise opinions" (*Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945)).

2. In any event, petitioners err in contending that the court of appeals has reformulated the fraudulent concealment doctrine.

a. Generally speaking, "[r]ead into every federal statute of limitations * * * is the equitable doctrine that in case of defendant's fraud or deliberate con-

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[6] Despite that express disclaimer, petitioners suggest (Pet. 10) that "the closely related doctrine does not justify the decision below." That is so, petitioners argue (Pet. 10 n.5), because the Board failed to address whether the joint-bargaining allegation was based on conduct that occurred within the six-month period prior to April 3, 1991, the date of the Union's charge. There is no merit to that suggestion. A complaint amendment that is otherwise closely related to a timely-filed charge must also be based on conduct that occurred within six months of that charge. Pet. App. 19a; see also *Redd-I, Inc.*, 290 N.L.R.B. 1115, 1115 (1988). That requirement was satisfied in this case. As the court of appeals noted, "[i]t is undisputed that the alleged unfair labor practice of bargaining without disclosing the terms of a multiemployer-bargaining agreement occurred within six months of the date on which the original charge was filed." Pet. App. 20a.

cealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit." *Fitzgerald* v. *Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977). The Sixth Circuit also has held, consistent with the decisions of other circuits (see Pet. 14-15), that under the fraudulent concealment doctrine, "a plaintiff must prove '* * * plaintiff's due diligence until discovery of the facts.'" *Hill* v. *United States Dep't of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995) (quoting *Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975)).[7] Applying that established principle here, the court correctly held that there was no plausible basis in this record for finding that the Union had failed to exercise due diligence in seeking to discover the terms of the mutual aid pact. See Pet. App. 22a (finding that such a claim "borders on

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[7] The Sixth Circuit's explication of the reasonable diligence principle does not differ from that of the other courts cited by petitioner (Pet. 14-15). See, *e.g.*, *IAM, Dist. Lodge 64* v. *NLRB*, 50 F.3d 1088, 1092 (D.C. Cir. 1995) ("'[D]eliberate concealment of *material* facts' tolls the statute until the plaintiff discovers or with due diligence should have discovered the basis of the lawsuit.") (quoting *District Lodge 64, IAM* v. *NLRB*, 949 F.2d 441, 449 (D.C. Cir. 1991)); *Truck Drivers & Helpers Union, Local No. 170* v. *NLRB*, 993 F.2d 990, 998 (1st Cir. 1993) (Board acts reasonably in "plac[ing] the burden of proving the exercise of due diligence in discovering the fraud on the party seeking to toll the statute of limitations"); *Landry* v. *Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 412-413 (5th Cir.) (plaintiffs have "obligation to exercise reasonable diligence to discover frauds perpetrated against them once they are on notice that such acts might have occurred"), cert. denied, 498 U.S. 895 (1990); *NLRB* v. *O'Neill*, 965 F.2d 1522, 1527 (9th Cir. 1992) ("[A] party who wishes to invoke the doctrine of fraudulent concealment must establish * * * the exercise of due diligence on his part."), cert. denied, 509 U.S. 904 (1993).

the disingenuous" given that "Long and his associates flagrantly misrepresented the Pact's terms").[8] The court did not establish a "new standard" (Pet. 15) that eliminated the need to exercise due diligence; instead, it considered the due diligence requirement and concluded that the Union had met its burden.

b. Stripped of its erroneous premise that the court of appeals reformulated the fraudulent concealment doctrine, petitioners' argument is merely a claim that, on the evidentiary record in this case, the Union failed to exercise due diligence. See Pet. 15-16, 18. According to petitioners (*ibid.*), the Union knew, no later than June or July 1991, that petitioners had entered into an agreement that called for unlawful joint bargaining. That fact-bound contention, which was rejected by the court of appeals, raises no issue warranting further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Moreover, petitioners' factual contention lacks merit. As the court of appeals explained, "the disclosure of the *existence* of the Pact is immaterial to the legality of [petitioners'] conduct"; rather, "the question is whether the [d]istributors disclosed the *terms* of the Pact," because "an agreement providing for coordinated bargaining is perfectly lawful, while one that provides for multiemployer bargaining without the Union's consent is a violation of the NLRA." Pet. App. 10a-11a n.3; see also *id.* at 22a. The court found that "[t]he record

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[8] While petitioners claim (Pet. 12) that the court established a rule that "an early concealment excuses later inaction without regard to the aggrieved party's actual state of knowledge or diligence in pursuing its rights," no such statement appears in the court's decision, nor is it reasonable to infer such a rule from the court's decision.

makes absolutely plain that the [d]istributors kept the *terms* of the Pact a closely-held secret." *Id.* at 21a. As of June or July 1991, the Union was operating under the misrepresentation, made by Long in March 1990, that petitioners had not pledged to negotiate exclusively through him and could "retain someone else without penalty." *Id.* at 7a, 56a-57a. At no time did petitioners disabuse the Union of Long's misrepresentations; in fact, they affirmatively reinforced those misrepresentations.[9] As the Board found, "[n]o one knew that the pact prohibited each of [petitioners] from bargaining directly with the Union or agreeing to terms and conditions which did not meet the minimums," and "[n]o one knew that, if one [c]ompany strayed from what the others wanted, it subjected itself to damages of at least $1,600,000." *Id.* at 55a-56a. Indeed, in July 1992, Long continued to perpetuate his misrepresentations by advising the Board's Office of Appeals that the pact was solely for the purpose of sharing the cost of negotiations and contained no provision that would "restrict [the individual distributors'] bargaining." *Id.* at 13a; see also *id.* at 56a.

Petitioners argue (Pet. 15, 18) that a passage from Union president Knox's testimony shows that, by June or July 1991, he knew that petitioners had entered into an agreement that called for unlawful joint bargaining.

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[9] For example, at the May 22, 1990 bargaining session, Long, in response to the Union's query, misleadingly suggested that "certain [d]istributors could well end up agreeing to different contract terms." At the September 22, 1990 bargaining session, officials of two distributors, in response to the Union's query as to whether petitioners had entered into an agreement "that binds you distributors together in any way," falsely stated that petitioners had not entered into any kind of pact whatsoever. See pp. 4-5, *supra*.

That argument is unpersuasive. In the cited passage, Knox testified:

> And it was very clear to me that they just could not make the decision for themselves. They were, in fact, you know—well, marching in lock step really because Cris Thomas kept saying they all wanted—they had the same everything else and we were getting no place with them. So I figured that they had to have some sort of document that bound them together. *And we wanted to know what the conditions were* so we could try to formulate our negotiations and create something.

Pet. App. 122a (emphasis added). Knox's testimony thus makes clear that he did not know, yet sought to discover, the actual terms of an agreement that appeared to him to "b[ind] [petitioners] together." When the Union asked Thomas for a copy of the pact at the July 12, 1991 meeting, he refused the request (*id.* at 10a), and Long continued to misrepresent its provisions (*id.* at 13a).[10] Because petitioners did not reveal the actual provisions of the pact until November 1992, the joint-bargaining allegation of the complaint was timely under Section 10(b) because the complaint was

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[10] Contrary to petitioners' suggestion (Pet. 18), on July 12, 1991, Thomas did not "confirm" that a pact containing terms indicative of illegal joint bargaining existed. Instead, he simply refused to produce a copy of the pact. Pet. App. 10a, 54a-55a. There is also no merit to petitioners' suggestion (Pet. 16) that, had the Union been diligent in June or July 1991, it would have asked the General Counsel to subpoena the pact. Since petitioners had earlier ignored a subpoena for the pact in a related Board proceeding (Pet. App. 21a-22a, 54a n.5), the Union could have reasonably concluded that a further subpoena would be a futile gesture in light of Thomas' assertion that the agreement was protected by attorney-client privilege. *Id.* at 10a.

amended to add that allegation less than six months later, in March 1993.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DON LEE DISTRIBUTOR, INC. (WARREN), DON LEE DISTRIBUTOR, INC. (DEARBORN), POWERS DISTRIBUTING COMPANY, INC., EASTOWN DISTRIBUTORS CO., HUBERT DISTRIBUTORS, INC. and OAK DISTRIBUTING CO.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038,

Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTERVENOR TEAMSTERS LOCAL 1038'S BRIEF IN OPPOSITION TO THE DISTRIBUTORS' PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit correctly found that substantial evidence supported the National Labor Relations Board's ruling that the amended complaint allegations of unlawful joint bargaining were not barred by Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	1
A. The Unlawful Joint Bargaining and Consistent Concealment	3
B. The Board's Decision	12
C. The Sixth Circuit's Decision	17
REASONS FOR DENYING THE WRIT	20
CONCLUSION	30

TABLE OF AUTHORITIES

Cases Page

Brown & Sharpe Mfg. Co., 299 NLRB 586 (1990), remanded sub. nom. *District Lodge 64 v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991) (*Brown & Sharpe I*), on first remand, *Brown & Sharpe Mfg. Co.*, 312 NLRB 444 (1993), remanded sub. nom., *Machinists District Lodge 64 v. NLRB*, 50 F.3d 1088 (D.C. Cir. 1995) (*Brown & Sharpe II*), on second remand, *Brown & Sharpe Mfg. Co.*, 321 NLRB 924 (1996), aff'd, *International Association of Machinists and Aerospace Workers District Lodge 64 v. NLRB*, 130 F.3d 1083 (D.C. Cir. 1997) (*Brown & Sharpe III*), cert. denied, —— U.S. ——, 118 S.Ct. 2319 (1998) 14, 24, 26

Dayco Corp. v. Goodyear Tire and Rubber Co., 523 F.2d 389 (6th Cir. 1975) 24

Ducane Heating Corp., 273 NLRB 1389 (1985), enf'd 785 F.2d 304 (4th Cir. 1986) 13, 24, 26

Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1997) 15, 24

Gardner v. International Telegraph Employees Local 9, 850 F.2d 518 (9th Cir. 1988) 29

Hill v. U.S. Department of Labor, 65 F.3d 1331 (6th Cir. 1995) 24, 29

Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984) 28

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 15, 24, 25

Jensen v. Snellings, 841 F.2d 600 (5th Cir. 1988) 29

John Morrell & Co., 304 NLRB 896 (1991), aff'd, 998 F.2d 7 (D.C. Cir. 1993) 30

Landry v. Air Line Pilots Association, 901 F.2d 404 (5th Cir. 1990) 30

Machinists Local 1424 v. NLRB (Bryan Manufacturing Co.), 362 U.S. 411 (1960) 25-26

NLRB v. O'Neill, 965 F.2d 1522 (9th Cir. 1992) 24

North American Rockwell Corp. v. NLRB, 389 F.2d 866 (10th Cir. 1968) 23

Redd-I, Inc., 290 NLRB 1115 (1988) 12

Sioux City Foundry Co. v. NLRB, 154 F.3d 832 (8th Cir. 1998) 23

TABLE OF AUTHORITIES—Continued

Page

Truck Drivers & Helpers Union Local 170 v. NLRB, (Girardi Distributors), 993 F.2d 990 (1st Cir. 1993) 22

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 17

Statutes and Rules

28 U.S.C. § 1254(1) 2

29 U.S.C. § 158 ..... 3, 8, 12-13, 15-16

29 U.S.C. § 160(b), (e) and (f) 1, 12, 17, 27

STATUTORY PROVISIONS

Applicable statutory provisions are set forth in the Appendix at App. 176a through 177a.

STATEMENT OF THE CASE

The Distributors'[1] Petition mischaracterizes the Sixth Circuit's decision in their attempt to conjure a "split in the circuits" sufficient to warrant review by this Court. (See Petition, pp. 3, 12, 14-15, and 18). The Sixth Circuit's decision does not establish a new standard in applying the statute of limitations in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). The Sixth Circuit's decision is not in conflict with decisions of other circuits or with decisions of this Court.

The Sixth Circuit held that substantial evidence supported the National Labor Relations Board's ruling that the General Counsel's joint bargaining[2] amendment to the complaint was not time-barred. The Administrative Law Judge ("ALJ"), the Board and the Sixth Circuit each found that there were two separate and independent grounds for this conclusion. First, under the "closely related" legal doctrine, the amendment to the complaint was not time-barred. (App. 50a-53a, 57a and 85a; App. 29a; App. 11a, 14a n.6 and 19a-21a).[3] Second, under

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[1] The Employers are referred to collectively as "the Distributors" and individually by their respective names (Don Lee Dearborn, Don Lee Warren, Oak, Powers, Hubert and Eastown). West Coast Industrial Relations Association is denoted as WCIRA. WCIRA's chief officers and the spokesmen for the Distributors were Attorney Fred Long and Chris Thomas. Charging Party Teamsters Local 1038 is referred to as the Union. The Union's president and chief spokesperson was Robert Knox.

[2] The terms "joint bargaining", "multi-employer bargaining" and "multi-unit bargaining" are used interchangeably herein.

[3] "App. —" denotes a page reference to the Appendix attached to the Distributors' Petition for a Writ of Certiorari and supplemented by the Appendix attached to this Brief in Opposition. Appendix 1a through 122a is attached to the Distributors' Petition for a Writ. Appendix 123a through 177a is attached to this Brief in Opposition. Because the Distributors' Appendix version of the Sixth Circuit's decision (App. 1a-23a) contains an inadvertent

the separate legal doctrine of fraudulent concealment, the amendment to the complaint was not time-barred. (App. 50a-58a and 85a; App. 29a-30a; App. 11a, 14a n.6 and 19a-22a).

The Distributors' Petition to this Court attempts to present a question regarding the Sixth Circuit's application of the fraudulent concealment doctrine only.[4] The Distributors "do not challenge the holding" below that under the "closely related" doctrine, the amendment was timely. (See Petition, p. 10).

Even if the fraudulent concealment doctrine were not applied to this case, under the separate and unchallenged "closely related" doctrine, the amendment was timely. Any review of the Sixth Circuit's application of the fraudulent concealment doctrine by writ of certiorari would not affect the disposition of this case. There is no reason to grant the Petition. See 28 U.S.C. § 1254(1).

Moreover, even if the fraudulent concealment doctrine were the only basis for the holding that the allegations were timely, the application of the fraudulent concealment doctrine to this case was in conformity with guidance from this Court, with established Board law and with the law in the circuits. The Board and the circuits have used a three-part standard for application of the fraudulent concealment doctrine—i.e. deliberate concealment of material facts from an injured party whose ignorance of such facts is not attributable to a lack of due diligence. The Sixth Circuit did not create a new standard or depart from established authority. The Sixth Cir-

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omission of a sentence, another copy of the decision (App. 123a-144a) is attached.

[4] The Distributors do not challenge the decisions of the ALJ, the Board and the Sixth Circuit that the Distributors committed the unfair labor practices of bad faith bargaining by unlawfully engaging in joint bargaining without Union consent (and not lawful coordinated bargaining) during the time period from the inception of bargaining in March, 1990 through the illegal implementations of their proposals on February 7, 1991 and April 15, 1991 and through the last bargaining session on August 21, 1991.

cuit simply found that there was substantial evidence to support the Board's finding that the Distributors had deliberately concealed the terms of their Pact (App. 145a-150a); that the terms of the Pact were material to the question of joint bargaining; and that the Union had been diligent. The Distributors' argument is actually an argument about the findings of fact made below and is not about the correct legal standard. The Petition must be denied.

A. *The Unlawful Joint Bargaining and Consistent Concealment* [5]

The Distributors' descriptions of the facts and the decisions below are misleading and incorrect. The actual facts demonstrate that the Union repeatedly inquired, requested documents, elicited sworn testimony and even subpoenaed documents relating to possible joint bargaining arrangements between the Distributors and that the Distributors consistently responded with lies, denials and evasions. This case involves more than a single lie or a mere denial by the Distributors of unlawful joint bargaining. This case involves a secret scheme by the Distributors to bargain jointly which they successfully concealed from the Union and the Board from March of 1990 until their Pact was

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[5] This summary highlights significant events relating to continued Union requests about the arrangements among the Distributors with respect to bargaining and the Distributors' consistent lies and evasions. For detailed background of the unlawful joint bargaining, see App. 3a-22a, 26a-30a and 42a-104a. While the Distributors' Petition is based solely on the Sixth Circuit's application of the fraudulent concealment doctrine, the Distributors recitation of facts contains misrepresentations of alleged Union misconduct in negotiations (Petition, p. 5) and their argument contends that a "remand" is necessary to determine whether the Union's alleged misconduct licensed the Distributors' violations of Section 8(a)(5) of the Act. (Petition, p. 10, n.5) Because the Distributors have not petitioned on this ground, this Brief in Opposition does not address these factual misrepresentations and erroneous legal argument. The facts and the law regarding this unmeritorious affirmative defense were specifically addressed by the ALJ, the Board and the Sixth Circuit.

produced on November 16, 1992. Set forth below is a chronological summary of significant facts regarding the fraudulent concealment of the terms of the Pact.

In 1987, the Union bargained with a multi-employer asociation known as DDOM which included the six Distributors. (APX 1695-96).[6] The Union and DDOM agreed to engage in joint bargaining. (AXP 1695). The Union was furnished with a copy of the Power of Attorney which bound the DDOM Employers to joint bargaining. DDOM and the Union reached a collective bargaining agreement for the term August 17, 1987 to May 1, 1990. (RX 4; APX 998-1052; App. 43a-44a).

In December of 1989 and January of 1990, each of the Distributors withdrew from DDOM and advised the Union of its intent to bargain separately. (GCX 25, 34-37; APX 179, 181-84).

On January 18, 1990, the Distributors signed their secret Pact to bargain jointly. (GCX 18; APX 157-60; App. 145a-150a, 6a). The Pact provided for:

- cost-sharing in case of a strike;
- cost-sharing for a $100,000 public relations campaign;
- prohibitions on actions by non-struck Distributors inconsistent with the "purposes" of the Pact in the event of a strike against any Distributor;
- 22 "minimum objectives" which cannot be changed by an individual Distributor and which can only be changed for all six Distributors after a majority vote approving the change;
- a prohibition against any Distributor bargaining *directly* with the Union;

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[6] (GCX —) refers to a General Counsel Exhibit. (RX —) refers to an Exhibit of the six Distributors. (CPX —) refers to a Charging Party Exhibt. (JX —) refers to a Joint Exhibit. Each reference to exhibits is followed by a page reference to the Sixth Circuit Joint Appendix where the exhibit is located. The Joint Appendix and Amended Supplemental Joint Appendix used before the Sixth Circuit are cited as (APX —).

- the assesment of a $1,600,000 penalty, plus damages, against any Distributor who breaches the Pact, or negotiates directly with the Union, or settles with the Union on terms "in excess of" the 22 minimum objectives pre-approved by all six Distributors;
- enforcement of the Pact in any Michigan state court of competent jurisdiction.

Neither the Pact itself nor the terms of the Pact were disclosed to the Union or the General Counsel, despite a 1990 subpoena for documents, despite questions under oath and despite repeated requests, until November 16, 1992. (App. 11a). The Pact actually prohibits any Distributor from engaging in lawful separate or "coordinated" bargaining. The Pact requires each Distributor to engage in unlawful joint bargaining (i.e., joint bargaining without the Union's consent). The Distributors' bargaining conduct was in accordance with terms of their secret Pact.

Don Lee Dearborn filed a unit clarification petition with the NLRB (case no. 7-UC-374). A hearing was scheduled for March 8, 1990. The Union served an NLRB Subpoena (Subpoena No. B-37283) (App. 151a-157a) on Donald Klopcic, President of both Don Lee Dearborn and Don Lee Warren, for the production of certain documents at the hearing, including "[a]ny and all documents . . . pertaining to the Employer's membership or participation in any employer association or to the Employer's assignment of bargaining and/or representational rights and/or responsibilities to any such employer association or entity or individual including West Coast Industrial Relations Association, Fred Long, Patrick Jordan . . . from January 1, 1988 to the present. (GC 47; JAPX 2194-2197; App. 155a). The Distributor did not produce the Pact. (App. 11a, n.4). At the hearing, Robert Van Goethem, Corporate Controller of Don Lee Dearborn and General Manager of Don Lee Warren, professed ignorance of the Pact. Donald Klopcic, President of both Don Lee Dearborn and Don Lee Warren, denied that the Pact existed. (APX 1563-65, 1601; App. 158a-161a).

On March 23, 1990, Long wrote the Distributors to quell their "paranoia." Long explained that he had employed Jordan to ensure that Knox would be "both frustrated and confused because although he knows WCIRA is lurking out there somewhere, he isn't sure how he will be attacked. Meanwhile, Jordan, the son-of-a-bitch that he is, has put all kinds of pressure on Knox." Long cautioned the Distributors not to reveal their strategy. (CPX 17; APX 1526-30; App. 162a-168a).

On March 27, 1990 bargaining began.[7] Knox asked Long whether the Distributors had entered into any kind of mutual aid pact. Long affirmatively lied about the arrangements among the Distributors and denied the existence of the Pact. Long replied, "I don't know if there is one [an agreement] or not." Long said the Distributors "could go off any way they want on their own." (APX 1703) and "could retain someone else [i.e., other than Long] without penalty." (App. 56a-57a; APX 1674, 1706). *The truth was* that on January 18, 1990, the Distributors (with the advice of Long) signed a secret "Mutual Aid Pact" (GCX 18; APX 157-60; App. 6a-7a; App. 145a-150a) which "clearly prohibited such acts on pain of substantial financial penalty." (App. 22a).

At the April 18, 1990 concurrent session, the Union again asked and the Distributors again denied the existence of the Pact. (APX 1710; App. 7a).

At the May 22, 1990 concurrent session, Knox questioned the Distributors about their alleged "coordinated" bargaining. Long responded their bargaining was not "joint" because some Distributors had separate issues and there would be minor differences. (APX 1723) Knox again pointed out the differences between Distributors and questioned the bargaining arrangements among the Distributors. Again, Long did not disclose the Pact. (APX 1723; App. 8a).

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[7] From March 27 through June 27, 1990, the parties met in "concurrent" sessions for all Distributors. Beginning with July 12, 1990, each bargaining session was designated for a particular Distributor.

At the June 27, 1990 concurrent session, the Union gave an economic proposal and requested true separate bargaining. (APX 1728-30) Thomas, who had replaced Long, replied that he would go along with the Union's request (although he did not) because he was legally required to do so. (APX 1735) Knox again inquired regarding the existence of the Pact. Thomas was unresponsive and evasive. (APX 1733).

Beginning on July 12, 1990, each bargaining session was designated for a particular Distributor. However, the management representatives who attended these allegedly "separate" sessions admittedly bargained for the interests of the Distributor who employed them rather than for the interests of the particular Distributor designatd for bargaining. (APX 1940, 2065-66). The unlawful and secret joint bargaining continued.

At the August 8, 1990 Oak session, the Union again asked for disclosure of any document describing the bargaining relationship between the Distributors and WCIRA. Thomas refused and asserted confidentiality. (APX 1764; App. 9a)

At the September 20, 1990 Don Lee Warren session, Knox again specifically asked about any written or oral agreement between the Distributors about negotiations. (APX 1780; App. 9a) Both Gustafson of Hubert and Van Goethem of Don Lee Warren affirmatively lied and denied that that there was a pact of any kind among the Distributors. (APX 1780; App. 9a) At the October 15, 1990 Hubert session, Knox complained that the Distributors were engaged in joint bargaining. Thomas denied that the Distributors were bargaining jointly. (APX 1788-1789)

On November 8, 1990, Knox wrote WCIRA. Knox continued to request separate meetings for each Distributor and "true separate bargaining." (GCX 98; APX 594-95) On November 9, 1990 Long responded by characterizing Knox's request for separate bargaining as "surface bargaining" by the Union. Long threatened impasse and implementation. (GCX 99; APX 596-601)

At the December 6, 1990 Eastown session, Long made a death threat against Knox. (APX 1799; App. 102a-103a)

On January 8, 1991, Knox again wrote that he wanted "true separate negotiations." (GCX 119; APX 628) Knox's insistence on separate negotiations caused Thomas to conclude that impasse had been reached for all six Distributors. (APX 2154-2155)

On February 7, 1991, the Distributors unilaterally implemented the non-economic portions of their LBOs. (App. 10a)

On April 3, 1991, the Union filed unfair labor practice charges against the Distributors. The six month period prior to this filing date is October 3 1990. The charges each alleged:

> "In the six months prior to the filing of this Charge, the Employer has violated Section 8(a)(5) of the Act by bargaining in bad faith and by, on or about February 4, 1991, unilaterally implementing terms and conditions of employment prior to reaching a *bona fide* impasse."

(APX 64, 67, 70, 73 and 79)

On April 15, 1991, the Distributors implemented the economic portions of their LBOs.[8] (App. 10a) The

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[8] These Draconian changes drastically cut wages and benefits for Union-represented employees of all six Distributors. For example, the Distributors unilaterally eliminated the $8.33 hourly base wage for truck drvers; eliminated the $7.65 hourly base wage for helpers; imposed a cut of $1.95 to $5.00 per hour for warehouse employees; imposed a cut of $1.50 to $3.00 per hour for reclamation employees; reduced holiday pay; eliminated four paid holidays; created a right to employ so-called "casuals" who have no contract rights or benefits and whose wages and conditions are set by management; created a right to use "casuals" for up to 50% of the work force; reduced vacation benefits; reduced health benefits; and created a unilateral right of management to make new rules without bargaining. This is a brief synopsis of the "highlights" of the Distributors' unilateral implementations which is evident from comparing the 1987-1990 DDOM Agreement to the jointly imposed LBOs. (RX 4; GCX 83(a)-(e); APX 998-1054, 445-559).

charges were amended to include the April 15, 1991 implementations.

On June 20, 1991, the NLRB Regional Director issued a partial dismissal of the Union's April 3, 1991 charges. The Regional Director found that there was insufficient evidence to support the Union's claim that the Distributors had bargained in bad faith by engaging in non-consensual joint bargaining. (APX 645-46; App. 12a-13a) The Union appealed to the NLRB General Counsel. (App. 13a and 49a) Thus, the joint bargaining allegations of the April 3, 1991 charges remained pending.

At the July 12, 1991 bargaining session, the Union again requested the Distributors to produce any document "that spelled out the employers' relationship to each other for purposes of collective bargaining." The Union specifically asked whether "there were any penalty provisions amongst the distributors." (App. 10a) Thomas, who claimed that the only written document he knew of was a fee schedule, conditioned disclosure on the Union's agreement to engage in group bargaining. Thomas certainly did not disclose (indeed he testified that he did not even know) that the Pact literally prohibited the Distributors from bargaining separately and actually required them to bargain jointly without Union consent. (APX 2125-2127; App. 169a-171a) The Union followed up with a letter reiterating its request and explaining the relevancy of the information it sought. Thomas responded by asserting attorney-client privilege and denying relevancy. (GCX 143 and 144; APX 643-646)

On July 26, 1991, the Regional Director issued a complaint based on certain bad faith bargaining allegations of the Union's April 3, 1991 charges. The Union appealed the joint bargaining allegations which were the subject of the Regional Director's June 20, 1991 partial dismissal. (App. 13a)

August 21, 1991 was the last bargaining session.

On July 6, 1992, Long wrote the NLRB Office of Appeals regarding the Union's allegations that the Distributors engaged in unlawful joint bargaining. Long lied to the NLRB. He stated:

> "Union alleges Employer had some kind of agreement making bargaining illegal. Although union could only speculate, Employers had only one agreement amongst them and that was a mutual aid pact sharing costs to pay negotiations, security protection if a strike occurred and related. None of the parties entered into any agreement that would restrict their bargaining."

(APX 161-B; App. 172a-175a; see App. 13a and 55a)

On July 28, 1992, the NLRB General Counsel, in partial reliance on Long's misrepresentations, denied the Union's appeal and affirmed the Regional Director's dismissal of the joint bargaining allegation, because "the evidence was insufficient to meet the burden of establishing that the Distributors had entered into an agreement to restrict separate agreements by the parties. . . ." (GCX 19(a); APX 162-163)[9]

On November 16, 1992, in response to a trial subpoena, the Distributors finally produced the Pact. (App. 14a; App. 145a-150a) The document demonstrates that the Distributors embarked on a secret course of illegal joint bargaining from the outset of negotiations and each act was done in accordance with this Pact. Upon review of the Pact, the Regional Director sought permission from the General Counsel to revoke his previous partial dismissal of the unlawful joint bargaining allegations. The Distributors were then afforded an opportunity to present their position(s). (APX 106, para. 4)

On January 22, 1993, the General Counsel withdrew his July 28, 1992 denial of the Union's appeal with respect

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[9] Thus, the joint bargaining allegations of the April 3, 1991 charges remained pending at least until July 28, 1992—i.e., within 6 months of the Board's January 27, 1993 Motion to Amend.

to the unlawful joint bargaining allegations of the April 3, 1991 charges and reinstated those allegations. (APX 106, para. 5)

On January 27, 1993, the General Counsel submitted a motion to the ALJ to amend the complaint to incorporate the joint bargaining allegations asserted in the April 3, 1991 charges. (See APX 104-17) On February 18, 1993, the ALJ permitted the amendment to the complaint. (See App. 50a)

These facts demonstrate that the Distributors have lied repeatedly [10] about their Pact to bargain jointly and that the General Counsel and Union were diligent. The Distributors impermissibly bargained as a group without Union consent in order to jointly and unilaterally inflict massive cutbacks in employee wages and benefits. This unlawful conduct occurred from the inception of bargaining on March 27, 1990 and the fraudulent concealment commenced on March 8, 1990 (prior to bargaining) and continued November 16, 1992.

This case started with a lie to the Union at the UC hearing on March 8, 1990, when Klopcic failed to produce the Pact under subpoena and testified that there was no agreement among the Distributors. (App. 151a-160a) This case was fueled with repeated lies and evasions by the Distributors to the Union during bargaining regarding the existence and terms of the Pact. That is why the Sixth Circuit found that: "Here, the facts could scarcely be stronger in support of the NLRB's finding of fraudulent concealment." (App. 21a) *This case climaxed with Long's lie to the General Counsel's Office of Appeals* on July 6, 1992 that, "Employers had only one agreement amongst them and that was a mutual aid pact sharing costs to pay negotiations, security protection if a strike occurred and related. None of the parties entered into any agreement that would

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[10] The Distributors admit that the Distributors repeatedly lied and evaded in response to persistent questions and requests from the Union. (Petition, p. 5)

restrict their bargaining." (APX 151-162B; App. 174a-175a; App. 13a)

B. *The Board's Decision*

Trial in this case took place over approximately 60 days from November 16, 1992 through October 26, 1993. On December 1, 1994, Administrative Law Judge Benjamin Schlesinger issued his decision finding that each of the six Distributors committed unfair labor practices under Sections 8(a)(1) and (5) of the NLRA and that Respondent WCIRA violated Section 8(a)(1) of the Act by Long's December 6, 1990 death threat to Knox.

The ALJ found that the allegation of unlawful joint bargaining without Union consent was not time-barred by Section 10(b) of the Act for two separate and sufficient reasons: (1) the "closely related" doctrine; and (2) the fraudulent concealment doctrine. (App. 50a-58a; APX 32-35)

Under the "closely related" doctrine of *Redd-I, Inc.*, 290 NLRB 1115 (1988), the General Counsel may amend an existing complaint to add additional allegations of conduct which might otherwise have been barred if the new allegations are "closely related" to the existing allegations and if the new allegations occurred within the six months prior to the date the charge on the existing allegations was filed. The analysis includes an inquiry into whether the new allegations are of the same class, arise from the same factual setting and involve the same or similar defenses as the existing allegations in the outstanding complaint. The charges here were filed on April 3, 1991. Thus, October 3, 1990 was the statute bar date if the "closely related" doctrine applies.

The ALJ analyzed the facts under the "closely related" doctrine. He found that the allegations of joint bargaining in violation of Section 8(a)(5) were "closely related" to the existing allegations of bad faith bargaining in violation of Section 8(a)(5) in the outstanding complaint. Because

the "closely related" joint bargaining allegations (like the existing bad faith bargaining allegations) concern the Distributors' bargaining conduct on and after October 3, 1990, they were not time-barred. The outstanding complaint was properly amended to include these additional Section 8(a)(5) allegations.

> "I conclude that Respondents violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith, clearly within the 6 months prior to the filing of the charges. . . ."

(App. 84a-85a and 50a-58a) His analysis of the timeliness issue could have ended there.

The ALJ also considered an alternative and additional theory for the timeliness of the allegations: the fraudulent concealment doctrine developed from *Ducane Heating Corp.*, 273 NLRB 1389 (1985), enf'd 785 F.2d 304 (4th Cir. 1986). The fraudulent concealment doctrine, if applicable, tolls the statute of limitations.

The ALJ reviewed the Distributors' acts of concealment on March 8, 1990, March 27, 1990, April 18, 1990, May 22, 1990, June 27, 1990, August 8, 1990, September 20, 1990, July 12, 1991 and July 6, 1992.[11] He considered and rejected the contention that the Union had not been diligent in its efforts to learn the truth about the existence and nature of the Pact. He noted that the Union had made repeated inquiries about the existence and nature of any joint bargaining agreement and had even (unsuccessfully) sought information about any Pact through an NLRB subpoena and through the examination of principal officers of two of the Distributors in a collateral NLRB proceeding in March of 1990. He also noted that the Union had filed charges on April 3, 1991; that the Union had appealed the Regional Director's June 20, 1991 dismissal of the joint bargaining allegations; that the joint bargain-

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[11] The Distributors' statement at page 8 that September 20, 1990 was "the last act of concealment" is incorrect. The ALJ found specific acts of concealment on and after September 20, 1990.

ing allegations remained pending until the General Counsel's July 28, 1992 denial of the Union's appeal; and that the other allegations of bad faith bargaining remained extant in the outstanding complaint. (App. 41a, n.1, 48a-50a) The ALJ found that the Distributors had engaged in affirmative lies (some under oath) as well as evasions and misrepresentations. He found that the Union had been diligent. The ALJ considered and rejected the argument that the Distributors' allusions to an "understanding" to engage in lawful coordinated bargaining or to "share" somehow excused their continued lies and evasions regarding the actual content of the Pact.

> "Even if Respondents had somehow hinted at the existence of the Pact in such a way that the Union should have divined its existence, Long and his cohorts certainly never gave any clue about its contents. The Union never knew, nor did the General Counsel. No one knew that the Pact prohibited each of the Respondents from bargaining directly with the Union or agreeing to terms and conditions which did not meet the minimums."

(App. 55a-56a)

With respect to the fraudulent concealment doctrine, the ALJ cited *District Lodge 64 v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991) (*Brown & Sharpe I*), on remand, *Brown & Sharpe Mfg Co.*, 312 NLRB 444 (1993). (App. 56a, n.6) The D.C. Circuit decisions and the Board's decisions in *Brown & Sharpe*[12] set forth the accepted three-part test for fraudulent concealment:

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[12] The *Brown & Sharpe* case has a complex procedural history. *Brown & Sharpe Mfg. Co.*, 299 NLRB 586 (1990), remanded sub. nom. *District Lodge 64 v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991) (*Brown & Sharpe I*), on first remand, *Brown & Sharpe Mfg. Co.*, 312 NLRB 444 (1993), remanded sub. nom. *Machinists District Lodge 64 v. NLRB*, 50 F.3d 1088 (D.C. Cir. 1995) (*Brown & Sharpe II*), on second remand, *Brown & Sharpe Mfg. Co.*, 321 NLRB 924 (1996), aff'd, *International Association of Machinists and Aerospace Workers District Lodge 64 v. NLRB*, 130 F.3d 1083 (D.C. Cir. 1997) (*Brown & Sharpe III*), cert. denied, —— U.S. ——, 118 S.Ct. 2319 (1998). In the final decisions in *Brown &*

> "The *Holmberg* doctrine, as described in *Fitzgerald* and as applied by the Board, has three critical agreements: (1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part."

The ALJ found a repeated pattern of affirmative lies and evasions regarding the existence and true nature of the Pact. He found that the fraudulent concealment doctrine applied to this case:

> 'I conclude that Respondents violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith . . . since the opening of negotiations in March 1990, under the cloud of the fraudulently concealed pact."

(App. 84a-85a) The ALJ concluded that even if the "closely related" doctrine did not operate to make the amendment timely, the fraudulent concealment doctrine would operate to toll the statute of limitations here and render the amendment timely. The Distributors deliberately concealed material facts about the existence and terms of the Pact and the Union had been diligent in its efforts to discover the truth about the Distributors' secret joint bargaining agreement. (See App. 53a-58a)

As to the merits of the case, the ALJ analyzed the secret Pact—its penalty provision; its enforcement provisions; its 22 "minimum objectives"; its prohibition against direct bargaining with the Union. The ALJ analyzed the conduct of the parties in bargaining and reviewed established Board precedent. He concluded:

> "Although the Companies have an absolute right to seek the best agreement they can obtain and to cut

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Sharpe, the Board concluded and the D.C. Circuit affirmed that the first prong of deliberate concealment had not been met. There were no affirmative acts of deliberate concealment. It is clear that this three-prong test was accepted by the District of Columbia Circuit and reflects the view of the Board, the circuits (including the Sixth Circuit) and the Distributors here. The ALJ in the *Don Lee* case applied this correct legal standard.

> back costs and eliminate "restrictive" rules, they do not have the right, without the Union's consent, to engage in joint bargaining with the Union. What Respondents have done here is joint bargaining and nothing more."

(App. 74a, 58a-84a; APX 38-39) The ALJ found that by bargaining jointly without Union consent, the Distributors engaged in bad faith bargaining by their unlawful insistence on a non-mandatory bargaining subject (i.e., the scope of the bargaining unit). This was not lawful coordinated bargaining. The ALJ also found that WCIRA violated Section 8(a)(1) by Long's December 6, 1990 death threat to Knox.

On November 8, 1996, the National Labor Relations Board issued a unanimous decision and order. The NLRB corrected a few "inadvertent factual errors which do not affect the decision" (App. 25a, n.2) and affirmed the ALJ's rulings, findings and conclusion. (App. 25a) The Board affirmed the finding that the Distributors embarked on a secret scheme of joint bargaining without Union consent. The Board found that the Distributors entered into the Pact as part of their joint bargaining scheme; that the Pact, with its penalty provision, enforcement provisions, list of 22 "minimum objectives", prohibition on direct bargaining with the Union and other components, implemented a system of joint bargaining without Union consent; that the Distributors, by their words and deeds, lived by the secret Pact and in fact bargained jointly without Union consent; that in so doing the Distributors unlawfully insisted to impasse on a non-mandatory subject of bargaining (i.e., the scope of the bargaining unit); and that Fred Long's death threat constituted a violation of the Act in and of itself.[13] Bargaining was unlawful from its inception; and the February and April, 1991 unilateral implementations of massive cuts in wages and benefits were unlawful. (App. 24a-30a)

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[13] The ALJ and Board decisions also addressed additional issues which are not the focus of this Brief.

As to the timeliness issue, the Board reviewed and affirmed the ALJ's findings and conclusions on the application of the "closely related" doctrine and the fraudulent concealment doctrine. The Board, like the ALJ, found that each doctrine applied and that each doctrine provided a separate and independent ground for the timeliness of the amendment. (App. 29a-30a)

The Distributors filed a petition for review of the NLRB decision and order in the Court of Appeals for the Sixth Circuit. The Board filed a cross-petition for enforcement of the Board's decision and order. The Union was granted Intervenor status.

C. *The Sixth Circuit's Decision*

On June 2, 1998, the Sixth Circuit issued a unanimous decision of the panel enforcing the Board's order and denying the Distributors' petition for review. The Sixth Circuit noted that under *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 497 (1951), its standard of review was limited:

> "[W]e must enforce the NLRB's order as long as it is supported by substantial evidence on the record viewed as [a] whole, even if evidence also exists that possibly could support a conclusion different from the one reached by the NLRB."

(App. 15a) *See also* 29 U.S.C. § 160(e) and (f). The Distributors do not dispute that the "substantial evidence" test is the appropriate standard of review. However, their arguments demonstrate that they are actually asking for a much more than a "substantial evidence" review of the NLRB's order.

The Sixth Circuit decided three issues relevant here: (1) substantial evidence supported the Board's decision that the Distributors engaged in unlawful joint bargaining (and not lawful coordinated bargaining); (2) substantial evidence supported the Board's decision that the allegations of unlawful joint bargaining were timely due to the application of the "closely related" doctrine because un-

lawful bargaining occurred on and after October 3, 1990; and (3) even if the "closely related" doctrine did not apply, substantial evidence supported the Board's decision that the allegations of unlawful joint bargaining were timely due to the application of the fraudulent concealment doctrine. (App. 15a-22a) The Distributors do not petition for review of the first two holdings here.

In its review of the Board's application of the fraudulent concealment doctrine, the Sixth Circuit did not depart from the recognized three-part test for fraudulent concealment and did not create a new standard. The Sixth Ctrcuit did not hold that "an early concealment excuses later inaction without regard to the aggrieved party's actual state of knowledge or diligence in pursuing its rights." (Petition pp. 3, 11-12 and 15) There is no "split in the circuits" as a result of this decision.

It is important to note that the Sixth Circuit was not required, or even permitted, to conduct a *de novo* review of the numerous credibility and factual findings made below based upon the lengthy trial record in this case. The Distributors incorrectly assault the Sixth Circuit's decision for its alleged failure to catalog each and every factual finding with respect to the fraudulent concealment doctrine.[14] However, the Sixth Circuit did not (indeed

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[14] For example, the Distributors claim that the Sixth Circuit's "decision identified various acts of concealment from the Union that the court of appeals deemed sufficient to toll Section 10(b), the last one of which occurred in September 1990." (Petition, p. 10). This is not accurate. The Sixth Circuit did not attempt to catalog each and every lie and misrepresentation which showed that the Board was correct. In fact, the court stated that "we do not discuss the evidence in detail" and went on to cite examples and certain significant events. (App. 6a-11a, n.3, n.4, 31a-22a) ("*For example*, in March 1990 . . . ;" "*e.g.*, Long's statement to Knox . . . ;" and "*e.g.*, the statement of two Distributor representatives. . . .") (Emphasis added) Further, the Sixth Circuit never claimed that "the last act" of concealment occurred in September, 1990. The Sixth Circuit found that substantial evidence supported the Board's ruling that affirmative acts of deliberate concealment occurred repeatedly from March, 1990 until the Pact was produced on November 16, 1992.

under established precedent could not) conduct a *de novo* review of the Board's decision. The Sixth Circuit reviewed the facts underlying the rulings and found that substantial evidence supported the decision that the fraudulent concealment doctrine was applicable to this case.

The central question presented by the Petition is whether the accepted three-part test for the fraudulent concealment doctrine was applied here. The Distributors mischaracterize the Sixth Circuit's ruling on fraudulent concealment. The Sixth Circuit did not abandon the three-part test. (See Petition, p. 10; App. 21a) The Sixth Circuit reviewed the facts and legal analyses below (which had cited the authority confirming the accepted three-part test and which had applied the three-part test) and found that substantial evidence supported the decision that the fraudulent concealment doctrine applied. The Sixth Circuit noted specific examples of affirmative and deliberate acts of concealment of material facts by the Distributors (the first two prongs) (see App. 6a-15a, 19a-22a). The Sixth Circuit also noted the efforts of the Union in asking questions, subpoenaing documents, subpoenaing witnesses, taking testimony, requesting documents and information, filing charges and appealing charges, which were thwarted by the Distributors' lies and evasions. The court stated, "we bear in mind the critically important fact that the Distributors consistently refused to disclose the terms of the Pact until an exceedingly late date [November 16, 1992];" [h]ere, the facts could scarcely be stronger in support of the NLRB's finding . . .;" "[t]he Union repeatedly asked about the existence of a mutual aid pact . . .;" "[t]he Distributors' responses were generally evasive . . . and were sometimes downright untruthful;" "the Distributors kept the *terms* of the Pact a closely-held secret;" and "flagrantly misrepresented the Pact's terms. . . ." (App. 11a, 14a, 21a-22a) The Sixth Circuit specifically discussed the Distributors' contention that the Union failed to exercise sufficient diligence and rejected it in light of the record evidence to support the rulings below. (See App. 22a.)

While the Sixth Circuit may not have elaborately set forth each and every factual finding and each and every nuance of the development of the legal principles to the satisfaction of the Distributors, it is absolutely clear the Sixth Circuit's decision on the fraudulent concealment doctrine reviewed the record and found that substantial evidence supported the ruling below. The correct test was properly applied to the facts. The diligence of the Union was considered. The Sixth Circuit found that the fact that the Union had suspicions and eventually learned that some kind of agreement existed did not trigger the statute of limitations, because the Distributors continually lied and misrepresented the terms of the Pact. The Union never had sufficient information to divine "the *terms* of the Pact." (App. 10a-11a, n.3, 14a, n.6, 21a-22a)

The Distributors filed a petition for rehearing en banc. The Distributors' petition for rehearing en banc was circulated among the original panel members as well as among all active judges of the Sixth Circuit. On July 10, 1998, the petition was denied. (App. 106a-107a)

REASONS FOR DENYING THE WRIT

1. The ruling that the General Counsel's complaint allegations were not time-barred was supported by two separate and independent grounds: (1) the "closely related" doctrine; and (2) the fraudulent concealment doctrine. The Distributors' Petition does not challenge the ruling on the first ground. Even if the ALJ, Board and Sixth Circuit were all mistaken as to the application of the fraudulent concealment doctrine, the timeliness decision is fully supported by the unchallenged and legally sufficient "closely related" doctrine. There is no reason to grant the writ.

The Distributors acknowledge that both the ALJ and the Board found that the "closely related" doctrine applied (Petition, pp. 9-10, n.5). However, the Distributors ignore the fact that the Sixth Circuit not only affirmed the application of the fraudulent concealment doctrine,

but also affirmed the application of the "closely related" doctrine. Under either doctrine, the allegations were timely. (App. 3a, 11a, 14a n.6 and 19a-21a) The Distributors do not seek review of the Sixth Circuit's holding that the joint bargaining allegations are timely under the "closely related" doctrine.

Nevertheless, the Distributors drop a footnote in which they appear to argue that, even though they are not challenging the application of the "closely related" doctrine, they claim the application of that doctrine "does not justify the decision below." (Petition, pp. 9-10, n.5) This is simply incorrect. Under the "closely related" doctrine, the General Counsel may add allegations of unfair labor practices to previously-filed charges if they are "closely related" to existing charges in an outstanding complaint and if they occurred within six months prior to the date the existing charges were filed. Here, the existing charges were filed on April 3, 1991. Under the "closely related" doctrine, the General Counsel could later add allegations of "closely related" unfair labor practices which occurred within six months (October 3, 1990) of the date the existing charges were filed (April 3, 1991). Here, the ALJ reviewed the facts under the doctrine and made a specific finding that the unfair labor practices of unlawful joint bargaining did in fact occur in the time period on and after October 3, 1990 and were thus timely. (App. 84a-85a) The Board affirmed and adopted this conclusion. (App. 29a)

The Distributors argued to the Sixth Circuit that the Board's rulings on both the "closely related" doctrine and the fraudulent concealment doctrine were wrong. The Sixth Circuit reviewed and affirmed the Board's application of both doctrines. (App. 19a-21a) As to the "closely related" doctrine, the court said, "it is undisputed that the alleged unfair labor practice . . . occurred within six months of the date on which the original charge was filed, and therefore we are not persuaded by the Distributors' primary [closely related] argument." (App. 20a) The

Sixth Circuit rejected the Distributors' argument that the joint bargaining allegations were not "closely related" to the existing bad faith bargaining charges in the outstanding complaint. (App. 20a)

The Distributors' statement that "the Board never conducted such an analysis here" (Petition, p. 10, n.5) with respect to the "closely related" doctrine is wrong. The Sixth Circuit specifically addressed those arguments by the Distributors and rejected them. The holding of the Sixth Circuit that the "closely related" doctrine provides a separate and legally sufficient basis for the timeliness of the joint bargaining allegations is not challenged by the Distributors' Petition and remains as an independent ground for the holding that the joint bargaining allegations were not time-barred.

The cases cited by the Distributors in footnote 5 have no application to the "closely related" doctrine. However, even if the Distributors' statements in footnote 5 were correct—and they are not—whatever complaints the Distributors might have about the "closely related" doctrine are irrelevant in view of their acknowledgement that they are not challenging the holdings below that the "closely related" doctrine provides an independent basis for the finding that the allegations were not time-barred. Indeed, some of the cases cited by the Distributors underscore the conclusion that the "closely related" doctrine is a sufficient basis to support the timeliness of the joint bargaining allegations.

In *Truck Drivers & Helpers Union Local 170 v. NLRB, (Girardi Distributors),* 993 F.2d 990, (1st Cir. 1993) (cited by the Distributors), the ALJ and the Board held the fraudulent concealment doctrine did not apply because there was no repeated deliberate concealment (as to the first prong) and the union failed to prove diligence (the third prong. They also held that the "closely related" doctrine did not apply. On review, the First Circuit found that substantial evidence supported the fraudulent concealment finding but did not support the "closely related"

ruling. The First Circuit remanded for a trial on the merits. This case actually underscores the reason why the Petition here could be denied; because even if the fraudulent concealment doctrine did not apply, the "closely related" doctrine did.

In *North American Rockwell Corp. v. NLRB*, 389 F.2d 866 (10th Cir. 1968) (cited by the Distributors), the General Counsel invoked a "closely related" doctrine to raise allegations which would otherwise be untimely. The ALJ and the Board agreed and the Tenth Circuit affirmed. The case did not allege or involve the fraudulent concealment doctrine. *See also Sioux City Foundry, Co. v. NLRB*, 154 F.3d 832 (8th Cir. 1998) (where union continued to pursue its appeal of the Regional Director's dismissal, the statute did not run).

In short, any review of the Sixth Circuit's application of the fraudulent concealment doctrine by writ of certiorari would not affect the disposition of this case because the joint bargaining allegations were "closely related" to the existing allegations in the outstanding complaint.

2. The Sixth Circuit's decision upholding the Board's ruling on the fraudulent concealment doctrine conforms with the three-part standard which has consistently been applied by the Board, the Sixth Circuit and all other circuits. The Distributors' characterization of the Sixth Circuit's decision is inaccurate. Their contention that the Sixth Circuit departed from existing law is false.

As the above discussion of the ALJ and Board decisions makes clear, the Sixth Circuit did not invent a new standard for the application of the fraudulent concealment doctrine. Under the doctrine of fraudulent concealment, the statute of limitations is tolled where:

(1) deliberate concealment has occurred;

(2) material facts were the object of the concealment; and

(3) the injured party was ignorant of those facts, without fault or want of due diligence on its part.

Brown & Sharpe Mfg. Co., 312 NLRB 444 (1993); *Brown & Sharpe Mfg. Co.*, 321 NLRB 924 (1996) (citing *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), and *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977)); *International Association of Machinists v. NLRB*, 130 F.3d 1083, 1087 (D.C. Cir. 1997) (*Brown & Sharpe III*). *See also Hill v. U.S. Department of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995) (quoting *Dayco Corp. v. Goodyear Tire and Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975)).

If the fraudulent concealment doctrine applies, "the limitations period begins to run when the charging party knows or should have known of the concealed facts." *Ducane Heating Corp.*, 273 NLRB 1389 (1985), enf'd 785 F.2d 304 (5th Cir. 1986). This standard was used by the ALJ in this case. (See App. 56a, n.6) The Board affirmed and the Sixth Circuit found that substantial evidence supported the Board's decision.

The Distributors agree that this three-part test is the appropriate test to apply to this case.[15] They do not challenge the findings that the Distributors in fact engaged in repeated and affirmative acts of deliberate concealment (the first prong) and that material facts were

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[15] In fact, the additional cases cited by the Distributors use the same three-part test. *See e.g., Brown & Sharpe Mfg. Co.*, 312 NLRB 444 (1993), on remanded, sub nom. *Brown & Sharpe II*, 50 F.3d 1088 (D.C. Cir. 1995). *Brown & Sharpe Mfg. Co.*, 321 NLRB 924 (1996), aff'd. *Brown & Sharpe III*, 130 F.3d 1083 (D.C. Cir. 1997) (although the issue in dispute in these cases were the first and second prongs and not the third prong); *NLRB v. O'Neill*, 965 F.2d 1522, 1527 (9th Cir. 1992) (the fraudulent concealment doctrine operated to toll the statute; the allegations were timely); *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977) (facts showed that as to former employee's claim against the Department of Defense, there was no deliberate and repeated concealment, he was on actual notice of all the material facts and the statute had run).

the object of the concealment (the second prong). However, they claim that the Board and the Sixth Circuit did not apply the diligence test (the third prong) to the facts here and that "as a matter of law" the Union failed to exercise reasonable diligence. (Petition, p. 16)

The Distributors contend that the Sixth Circuit's decision with respect to fraudulent concealment is "contrary to guidance from this Court regarding applicability of the fraudulent concealment doctrine to all federal statutes." (Petition, p. 12) This is not correct. The Distributors cite two United States Supreme Court cases with respect to fraudulent concealment and both cases support the decision of the Sixth Circuit here.

In *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), the district court found that a suit which was filed more than 10 years (the statute) after the actionable events took place was nonetheless timely. The Second Circuit reversed. The Supreme Court found that under the equitable doctrine of fraudulent concealment, the statute of limitations had been tolled and the suit was timely. The Court spoke to a diligence requirement, but also indicated that "equity eschews mechanical rules; it depends on flexibility." "If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time." "Equity will not lend itself to such fraud." 327 U.S. at 396-97. The Sixth Circuit's review here of the findings below of deliberate, affirmative concealment and the Union's efforts to discover the truth is not in conflict with *Holmberg*.

The Distributors also cite *Machinists Local 1424 v. NLRB (Bryan Manufacturing Co.)*, 362 U.S. 411 (1960), (Petition, p. 12) to support their contention that the Sixth Circuit has departed from Supreme Court precedent on fraudulent concealment. In *Bryan Manufacturing Co.*, there was no claim of fraudulent concealment involved. In fact, footnote 19 states *"it need hardly be pointed*

out that we are not dealing with a case of fraudulent concealment alleged to toll the statute." 362 U.S. at 429, n.19 (emphasis added). There was also no claim that the "closely related" doctrine applied. This case provides some general rules about the statute of limitations, but is not in conflict with the Sixth Circuit's decision.

The Sixth Circuit's decision is also not in conflict with *Brown & Sharpe II,* 50 F.3d 1088 (D.C. Cir. 1995). In that particular ruling, the issue was the Board's application of the materiality prong (the second prong). There was no diligence (third prong) issue. Similarly, the Sixth Circuit's decision here is not in conflict with the decision in *Brown & Sharpe I,* 949 F.2d 441, 449 (D.C. Cir. 1991). (Petition, p. 18) In *Brown & Sharpe I,* the D.C. Circuit remanded a surface bargaining case to the Board so that it could set forth a definitive test regarding the application of the fraudulent concealment doctrine from *Ducane Heating Corp.* There was no finding in that decision regarding diligence. On the remand after this decision, the Board adopted the three-part standard cited herein. In the end, the ruling was that the first prong (deliberate concealment) was not met. There was no ruling as to the third prong in the *Brown & Sharpe* decisions.

Here, charges were filed by the Union on April 3, 1991. The joint bargaining aspect of those charges was pending from April 3, 1991 through at least July 28, 1992. Other aspects of those charges went to complaint and were still pending as of February, 1993. On July 28, 1992, after receiving Long's July 6, 1992 letter (App. 172a-175a), the Office of Appeals denied the Union's appeal and affirmed the dismissal as to the joint bargaining allegations of the April 3, 1991 charges. On November 16, 1992, the Pact was finally produced and disclosed. The Regional Director sought permission from the General Counsel to revoke his previous partial dismissal of the unlawful joint bargaining allegations. The Distributors were afforded an opportunity to present their position(s). (APX 106, para. 4) On January 22, 1993 (less than six months after July

28, 1992), the General Counsel reinstated the joint bargaining allegations of the April 3, 1991 charges. On January 27, 1993, the General Counsel filed the motion to amend the complaint. On February 18, 1993, the ALJ granted that motion.

A pattern of individual acts of affirmative and deliberative concealment occurred on March 8, 1990, March 27, 1990, April 18, 1990, May 22, 1990, June 27, 1990, August 8, 1990, September 20, 1990, July 12, 1991, July 16, 1991 and July 6, 1992, until production of the Pact on November 16, 1992.

Even before the fraudulent concealment doctrine or the "closely related" doctrine is considered, the facts here show that the allegations were timely: the allegations of the February 18, 1993 amended complaint were "based upon . . . unfair labor practice[s] [i.e., joint bargaining as bad faith bargaining] occurring" within "six months [i.e., October 3, 1990] prior to the filing of the charge [i.e., filed on April 3, 1991]." See 29 U.S.C. § 160(b). However, to the extent the reinstatement of the allegations on January 22, 1993 is the relevant "filing" date rather than April 3, 1991, the fraudulent concealment doctrine properly applies here to toll the statute of limitations so that it had not yet run as of January 22, 1993, January 27, 1993 or February 18, 1993.

First, neither the Pact itself nor its terms were disclosed until November 16, 1992 and the charges were reinstated on January 22, 1993 (within six months thereafter). The statute was tolled from March, 1990 through November 16, 1992 and began running on November 16, 1992.

Second, while the Union had suspicions, the Union did not have actual knowledge of the terms of the Pact or the type of pact involved here until November 16, 1992. The statute was tolled until November 16, 1992 and began running on November 16, 1992.

Third, even though the Union had mistrust and suspicion, they were not sufficient to impart "constructive notice" to the Union of the unlawful terms of the secret agreement. The Distributors contend that the Union could have, with reasonable diligence, discovered the terms of the Pact and should have "divined" that the "understanding" was in fact the type of Pact here. However, that argument was specifically rejected below and is contrary even to the authority cited by the Distributors. *See e.g., Hobson v. Wilson*, 737 F.2d 1, 39, 40 (D.C. Cir. 1984) (mere "suspicions cannot conceivably constitute notice of possible . . . violations, without creating the anomalous situation of requiring persons to file suit on a hunch. . . .").

Fourth, the Union acted to pursue its rights diligently during the period of concealment from March, 1990 until the Pact was produced on November 16, 1992. The Union subpoenaed documents, subpoenaed witness testimony, asked questions, requested documents and information, filed timely charges on April 3. 1991 and appealed the partial dismissal. The Union did not sit on its rights. The Union took these steps in the face of the Distributors' affirmative, repeated and deliberate lies and evasions.

Fifth, tolling of the statute did not end by the end of July 12, 1991 and then run by the end of January, 1992, as the Distributors claim. (Petition, p. 18) July 12, 1991 is the date of the bargaining session where Thomas purportedly admitted the existence of some kind of pact. In fact, however, Thomas testified that as of July 12, 1991, the only written agreement which he knew of was a "fee schedule." (APX 2125, 2137; App. 169a-171a) Shortly thereafter, when the Union reiterated its need for a copy of any agreement describing the bargaining relationship between the Distributors, Thomas asserted attorney-client privilege and irrelevance. (App. 10a; 54a-55a) Moreover, this argument ignores the fact that the Union was actively pursuing the joint bargaining allegations during the time period from at least April 3, 1991 through at least July 28, 1992. Further, this argument ignores the fact that

Long's July 6, 1992 letter to the General Counsel's Office of Appeals (App. 172a-175a) affirmatively and flagrantly further misrepresented the existence and the terms of the alleged "cost sharing" agreement. The fact that the Union or General Counsel might have learned that some type of agreement existed which was repeatedly misrepresented is not sufficient to bar tolling here. (See App. 49a-50a, 53a-58a; 10a-11a, n.3, 13a, 19a-22a)

In sum, there is no "split in the circuits" as a result of the Sixth Circuit's decision in this case. As *Hill v. U.S. Department of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995), demonstrates, the Sixth Circuit has historically utilized the generally-accepted three-part test for application of the fraudulent concealment doctrine. The same test was applied here, and the Sixth Circuit's decision that the rulings below were supported by "substantial evidence" was proper.

The cases cited by Distributors use the same three-part test, although the facts of each case dictated varying results. For example, in *Gardner v. International Telegraph Employees Local 9*, 850 F.2d 518, 523 (9th Cir. 1988), the court of appeals found that as to one claim, there was no deliberate concealment (the first prong) and thus no tolling. As to another claim, the court of appeals found that the case should be remanded to ascertain facts (which were not in evidence) about when the plaintiff learned his contract had a grievance procedure. Here, there are abundant facts in evidence about the Union's requests, suspicions and state of knowledge to support the ruling that there was substantial evidence that the Union satisfied the third prong.

In *Jensen v. Snellings*, 841 F.2d 600 (5th Cir. 1988), two investors sued their attorney and broker (among others) under securities laws. The plaintiffs argued that the statute should be tolled. The district court held that the statute was tolled until plaintiffs had notice of the requisite facts, but that the suit was nonetheless untimely because they had not sued within two years (the statute

period) of the date their new attorney informed them of the misconduct of the defendants. The court of appeals affirmed. This case does not use a different standard. It simply involves different facts and claims.

John Morrell & Co., 304 NLRB 896 (1991), aff'd, 998 F.2d 7 (D.C. Cir. 1993) also does not evidence any "split" with the Sixth Circuit. In that case, the statute was tolled (due to fraudulent concealment) up until the point the union had facts and was on notice that the employer's motive for its actions was suspect when a magistrate in another proceeding disclosed the company's suspect scheme to rid itself of the union. The union there had sufficient "material" facts long before it filed its charge. Here, the Distributors' "motive" is not the issue but rather their agreement and actions. The Pact is not simply "motive" evidence of unlawful and continuing conduct which was deliberately concealed until November 16, 1992.

The Sixth Circuit's enforcement of the Board's decision here is also not in conflict with *Landry v. Air Line Pilots Association*, 901 F.2d 404 (5th Cir. 1990). In *Landry*, there was no proof of deliberate concealment by the union of the material facts. The plaintiffs were on actual notice or "inquiry notice" of the facts and there was no proof of "active concealment." This is a decidedly different factual scenario than the present case in which there is abundant uncontested evidence of repeated, affirmative and deliberate acts of concealment. Further, this case does not apply a test different from that of the Sixth Circuit here.

CONCLUSION

For the foregoing reasons, Intervenor Teamsters Local 1038 requests that the Distributors' Petition be denied.

Respectfully submitted,

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Dated: December 16, 1998

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 96-6704; 97-5140

DON LEE DISTRIBUTOR, INC. (WARREN); DON LEE DISTRIBUTOR, INC. (DEARBORN); POWERS DISTRIBUTING COMPANY, INC.; EASTOWN DISTRIBUTORS, CO.; HUBERT DISTRIBUTORS, INC.; and OAK DISTRIBUTING CO.,
Petitioners/
Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/
Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038,
Intervenor.

On Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board

Nos. 7-CA-31719(2)-(7), 7-CA-32164(1), 7-CA-32896,
7-CA-32986, 7-CA-33649, 7-CA-33707, 7-CA-31302

Argued: March 19, 1998
Decided and Filed: June 2, 1998

Before: BOGGS, NORRIS, and MOORE, Circuit Judges.

OPINION

BOGGS, Circuit Judge. This case comes to us on the petition of six Detroit-area beer distributors (collectively, "Distributors") to review an order of the National Labor Relations Board ("NLRB") finding that the Distributors committed unfair labor practices in violation of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("NLRA"), and on the NLRB's cross-petition for enforcement of its order. We are confronted with two issues: first, whether the Distributors' conduct during collective bargaining sessions with the union representing their employees constituted unlawful "joint" or "multi-employer" bargaining, or merely constituted permissible "coordinated" bargaining; and second, whether the NLRB was time-barred from pursuing a claim against the Distributors based on unlawful multiemployer bargaining.

I

The Distributors are wholesale beer distributors operating in the Detroit area. Each of the six Distributors is separately owned and operated, except that Don Lee Distributor, Inc. (Warren) and Don Lee Distributor, Inc. (Dearborn), are both owned by a single parent company. The employees at each of the Distributors comprise separate bargaining units. For many years, the Distributors' drivers, warehouse employees, and reclamation employees have been represented for collective bargaining purposes by Local 1038, International Brotherhood of Teamsters, AFL-CIO ("Union"). In 1987, the Distributors joined forces with other beer distributors in the area to form the Downriver, Detroit, Oakland, and Macomb Wholesalers Association, Inc. ("DDOM") in an effort to negotiate more favorable terms with their respective groups of em-

ployees. Their efforts through the DDOM were unsuccessful; after a 12-week strike, the Distributors—apparently confronted with something of a "Prisoner's Dilemma"—were left to the "mercy of other . . . wholesalers" as several other DDOM members made individual deals with the Union on terms more favorable to the Union than the Distributors and other DDOM members originally had anticipated.

Dissatisfied with their DDOM experience, the Distributors decided in January 1990 to withdraw from the association. Executives of each of the Distributors had met in December 1989 wit Fred Long, the chief executive of a labor-relations firm called West Coast Industrial Relations Association, Inc. ("West Coast"), to discuss alternative ways of bargaining together to increase their bargaining power relative to the Union. Long told the Distributors that the problem with the 1987 DDOM negotiation was that the structure of DDOM permitted the Union to "whipsaw" DDOM members in the collective bargaining process.[1] To combat the whipsawing problem, Long advised the Distributors to enter into a mutual aid pact ("Pact") that provided, in pertinent part, as follows:

1. Each Distributor shall enter into its own Agreement with the Union. Nothing contained herein shall be construed to reflect a multi-employer association nor create a multi-employer unit. This

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[1] "Whipsawing" is a "union stratagem seeking to obtain benefits from a number or group of employers by applying pressure to one, the objective being to win favorable terms from the one employer and then use this as a pattern, or perhaps a base, to obtain the same or greater benefits from the other employers, under the same threat of pressure (including a strike) used against the first one." *See* ROBERTS DICTIONARY OF INDUSTRIAL RELATIONS (rev. ed. 1971); *see also* WEBSTER'S THIRD NEW INT'L DICTIONARY (1986) ("3: to use more favorable terms gained (as in one company) as the precedent or leverage to win equal or greater concessions from (as a related company).").

document reflects a coordinated bagaining effort among individual and independent Distributors.

2. Each Distributor shall share costs and expenses of Fred R. Long and his associates who shall represent the Distributors['] bargaining efforts with the Union . . . .

* * *

7. Distributors agree to the establishment of the minimum objectives, described in Exhibit B, for a new Collective Bargaining Agreement which can only be changed by a majority vote of the participating Distributors.

8. In the event any Distributor is in breach of this Agreement or negotiates directly with the Union (or any other Union or person or group who allegedly is representing this Union's Interest) or agrees to settle on terms and conditions in excess of those listed in item 7 herein above, that Distributor, in addition to any other damages for breach of this Agreement that may occur in any enforcement law suit brought by any of the other Distribuotrs shall, in addition, pay to each of the other Distributors a penalty fee of $400,000 to each.

The "minimum objectives" mentioned in Paragraph 7 of the Pact, which vary markedly in relative specificity, were listed as follows:

1. Eliminate eight (8) hour minimum/maximum day.
2. Remove load limit.
3. Overtime after forty (40) hours per week.
4. Management rights clause.
5. More restrictive grievance procedure.
6. Single pay holidays.

7. Simplified vacation language.
8. Four (4) weeks maximum vacation, red circle everyone over.
9. Cooler and basement deliveries required.
10. Reduction in wages.
11. Refined benefit pension plan—percentage of earnings.
12. Insurance revisions.
13. No curfew.
14. Bulk deliveries.
15. Zipper clause.
16. Empty pick up rate.
17. Longer probation period.
18. No restrictions on number of part-time employees.
19. Reduction on commission when helper is used.
20. More flexibility with reclamation duties.
21. Common expiration date.
22. Minimum three year contract.

On January 18, 1990, the Distributors signed the Pact.

As the existing DDOM contract was set to expire in May 1990, the Distributors and the Union began making plans for a new round of collective bargaining in March 1990. Early on, Long's associates (on behalf of the Distributors) broached the idea of "joint' or "concurrent negotiations," but Robert Knox, the president of the Union and the chief Union negotiator, initially rejected this idea. On March 27, 1990, the Distributors and the Union held an initial meeting to discuss collective-bargaining issues. At this meeting, Long presented a memorandum to Knox detailing the Distributors' initial position. This memoran-

dum stated that "the bargaining positions of each [Distributor] are the same and any proposal I offer for any one of them will be identical for the others for delivery department and warehousing department personnel representing the bulk of each bargaining unit." On the other hand, the memorandum also stated that "[i]t may also develop through the negotiating process even for delivery department or warehouse department personnel, that it is advantagous for a certain company and the union to agree on a provision not acceptable to other companies or the union. Although the companies do not contemplate such differences, it is possible they may develop as issues are discussed. Such agreed upon differences, if any, would be incorporated into that company's contract."

At the March 27 1990, meeting between the Distributors and the Union, Knox specifically asked Long whether the Distributors had entered into any kind of mutual aid pact. Instead of disclosing the existence and terms of the Pact, Long replied that the possible existence of a mutual aid pact was "none of his business and that it was not relevant to bargaining." Long did volunteer, however, that the Distributors had *not* pledged to negotiate exclusively through Long and that they could "retain someone else without penalty." Faced with Knox's reluctance to participate in any "joint" or "concurrent' bargaining, Long told Knox that if the Union insisted on separate bargaining, Long would conduct the bargaining session for one of the Distributors, after which a representative of one of the Distributors would insist on identical contract terms for each of the other five Distributors. Rather than participate in such a futile endeavor, Knox agreed to try the joint bargaining approach and "see how it progressed."

The first actual bargaining session was held on April 18, 1990. On that date, the parties exchanged initial proposals. Long presented six identical proposals, one for each of the Distributors. Knox therefore asked again whether there was an association or other collective under-

standing among the Distributors. Long again refused to answer and stated that "that wasn't an appropriate subject for bargaining." Bargaining continued, with little progress, through April and most of May 1990.[2] At a bargaining session held on May 22, 1990, the question of whether the Distributors were engaging in joint bargaining came up again, and again Long gave a somewhat evasive answer that suggested that certain Distributors could well end up agreeing to different contract terms. Despite this response, on June 8, 1990, Long wrote to Knox making clear that the Distributors would have a common, identical position on all major subjects of collective bargaining: Long stated that "[*w*]*e* are coming close to having everything *we* need to refine *our* first proposal next week. . . . *We* will have our position on this issue refined soon. . . . [*O*]*ur* economic package, as it may develop in negotiations, will be conditioned on resolution of non-economic language and specifically elimination of restrictive provisions *we* define as featherbedding." (emphasis added). Sure enough, at the June 19, 1990, bargaining session, the Distributors once again presented six identical proposals, one for each Distributor.

In the late June and early July 1990 bargaining sessions, the Union representatives began insisting on separate bargaining. The Distributors vigorously resisted this idea, stating through Long at one point that "[t]he contract for all the distributors we represent is essentially identical . . . . [W]e believe that this ploy . . . represents nothing more than yet another dilatory tactic on your part." Nonetheless, the Union went forward with its plan, identifying specific issues unique to particular Dis-

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[2] Tellingly, on April 20, 1990, the Distributors sent a joint letter to their retail customers with numerous collective references: "our contract," "we are asking the union to eliminate featherbedding practices," and the like. They also formed a collective group called the Coalition for Job Preservation, publishing letters in local newspapers to similar effect.

tributors. For example, on July 16, 1990, the Union presented a comprehensive proposal covering only the Powers Distributing Co. bargaining unit. On July 18, 1990, the Union proposed implementing a "daily route bidding system" at Don Lee (Dearborn). In response to these individualized proposals, the Distributors incongruously responded with six identical counterproposals—even though the Union had made no proposal with respect to four of the six Distributors. On August 8, 1990, after the Distributors mysteriously made identical counterproposals despite the uniqueness of the Union's two Distributor-specific proposals, the Union requested that Long's associate, Chris Thomas, provide a copy of all documents showing the relationship between West Coast and the Distributors. Thomas refused to provide the requested documents, stating that they were confidential.

On September 5, 1990, Thomas informed the Union that the Distributors' counterproposals on the route-bidding issue—the issue raised by the Union only with respect to one of the Distributors—were withdrawn because the Union had not responded to them. On September 11, 1990, West Coast transmitted what it called the Distributors' final offer, making clear that the Distributors were presenting "complete and identical" offers. At the same time, West Coast declared an impasse because of the apparent futility of further negotiations over such issues as compensation for drivers and co-payment of health care premiums. At the next bargaining session, on September 20, 1990, Knox specifically asked the Distributors whether there was "a written or oral document that binds you distributors together in any way." Two different Distributor representatives specifically said that there was no pact of any kind among the Distributors.

Between October 1990 and January 1991, several bargaining sessions were held at which the Union attempted to get the Distributors to consider Union proposals that

raised issues unique to particular Distributors. The Distributors essentially rejected these overtures, continuing to assert that the Distributors had identical positions on all issues. Finally, on January 14, 1991, Thomas sent Knox a letter by certified mail stating:

> Mr. Knox, *we are at impasse at Eastown, Don Lee Pontiac, Don Lee Dearborn, Oak, Powers, and Hubert.* Each has the same identical position on the ten (10) key items herein noted amongst others. If there is no agreement on these ten (10) items, there can be no agreement with any of them.

On January 30, 1991, the Distributors simultaneously notified the Union that they would unilaterally implement the non-economic portions of their final offer on February 7, 1991. On April 10, 1991, the Distributors notified the Union that they would implement the economic portions of their final offer on April 15, 1991.

The parties held another bargaining session on July 12, 1991. At this session, an attorney for the Union requested production of any document "that spelled out the employers' relationship to each other for purposes of collective bargaining." The Union's attorney also specifically asked whether "there were any penalty provisions amongst the distributors." Thomas, representing the Distributors, declined to provide the requested information. Thomas later took the position that the Pact was subject to the attorney-client privilege because Long (whose signature does not appear on the Pact) is a member of the Michigan bar.[3]

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[3] We recognize that the record contains some evidence suggesting that West Coast disclosed at least the existence of some kind of agreement early in the negotiations. For two reasons, we do not discuss this evidence in detail. First, in reviewing the NLRB's order our only task is to ascertain whether substantial evidence supports the order, and not to irrespective of whether there is evidence that could support a contrary conclusion. *See Universal*

Several months later, two individual distributors unilaterally changed the conditions of employment for Union members in ways that are contested in this case. In November 1991, Don Lee (Dearborn) changed its drivers' routes based solely on the drivers' performance, without regard to seniority, and without the opportunity to bid on routes that had been respected under the 1987 DDOM contract. In July 1992, Powers Distributing informed its drivers that it would discipline any driver who returned an improperly filled empty can collection bag, referred to by the Union as Powers's new "can bag" policy), despite the fact that under the 1987 DDOM contract drivers were not penalized for inadvertently returning less-than-full bags of aluminium cans for recycling.

II

Because the Distributors assert a limitations defense, we find it useful to summarize in detail the procedural history of this case; in doing so, we bear in mind the critically important fact that the Distributors consistently refused to disclose the terms of the Pact until an exceedingly late date.[4]

Camera Corp. v. NLRB, 340 U.S. 474 (1951). Second, the disclosure of the *existence* of the Pact is immaterial to the legality of the Distributors' conduct. As explained below, an agreement providing for coordinated bargaining is perfectly lawful, while one that provides for multiemployer bargaining without the Union's consent is a violation of the NLRA. Thus, the question is whether the Distributors disclosed the *terms* of the Pact, not merely whether the Distributors disclosed its existence.

[4] For example, in March 1990 (three months after the Distributors entered into the Pact), one of the Distributors failed to produce a copy of the Pact in response to a subpoena that requested "[a]ny and all documents . . . pertaining to the Employer's membership or participation in *any* employer association or to the Employer's assignment of bargaining and/or representational rights and/or responsibilities to any such employer association or entity or individual including West Coast Industrial Relations, Fred

The charge at issue in this case was filed by the Union on April 3, 1991. The charge alleged simply that "[i]n the six months prior to the filing of this Charge, the Employer[s] ha[ve] violated Section 8(a)(5) of the [National Labor Relations] Act by bargaining in bad faith and by, on or about February 4, 1991, unilaterally implementing terms and conditions of employment prior to reaching a *bona fide* impasse." On June 20, 1991, the Regional Director of the NLRB declined to issue a complaint with respect to the Union's allegations. In particular, the Regional Director concluded that there was no evidence that the Distributors had unlawfully engaged in multiemployer bargaining without the Union's knowledge or consent:

> The investigation revealed that above six Employers all secured the services of the same labor relations consulting firm to represent them in their efforts to reach agreement with the Charging Union regarding a collective bargaining agreement. The Employers admittedly sought the same contract language and bargained to that end.
>
> The parties met regarding each of the six companies on a rotating basis. There is no evidence that the Employers wished to change the scope of the six individual units or combine them into one unit. Nor is there any evidence that, in the event an overall agreement is reached, that the Employers intend not to bargain individually over issues which might pertain to each respective company. I conclude that the Employers are permitted to bargain in a group with a single representative of their choice and to negotiate for identical language in their collective bargaining agreement with the Charging Union.[5]

Long, Patrick Jordan, or the firm of McLaughlin and Irvin from January 1, 1988 to the present."

[5] The Union, as intervenor, has opposed the Distributors' motion to take judicial notice of the Regional Director's decision, although

In reaching this decision, the Regional Director did not have the benefit of seeing the text of the Pact.

The Union appealed the Regional Director's refusal to issue a complaint based on the Distributors' alleged unlawful multiemployer-bargaining practices. In connection with this appeal, Long wrote a letter to the NLRB's Office of Appeals in which he stated that, while the Distributors did have a "mutual aid pact," it was solely for the purpose of sharing the cost of negotiations and contained no provision "that would restrict [the individual Distributors'] bargaining." On July 28, 1992, the Office of Appeals sustained the Regional Director's decision, stating that "the evidence was insufficient to meet the burden of establishing that [the Distributors] had entered into an agreement to restrict separate agreements by the parties or that [the Distributors] had attempted to combine all the bargaining units into one unit." The record before the Office of Appeals did not include a copy of the Pact.

Notwithstanding his initial refusal to file a complaint, on July 26, 1991, the Regional Director did issue a complaint challenging two specific aspects of the Distributors' February 1991 actions: their imposition of a longer probationary period for new employees, and their new classification of "casual" employees. Shortly thereafter, the Regional Director amended the complaint to challenge the legality of the Distributors' unilateral implementation of its economic proposals in April 1991 without first reaching a bona fide impasse.

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the NLRB has not (and, indeed, has stipulated to its authenticity). Pursuant to Fed. R. Evid. 201, we have held that it is appropriate to take judicial notice of "adjudicative facts" such as agency and judicial decisions, even where those decisions contain disputed statements of fact, as long as we take judicial notice for some purpose other than to take a position on the disputed fact issue. *See, e.g., United States v. Garland*, 991 F.2d 328, 332 (6th Cir. 1993).

The Distributors did not produce a copy of the Pact until the beginning of the administrative hearing in this matter (on November 16, 1992), after a subpoena had been issued for its production. Shortly thereafter, the General Counsel moved to amend the complaint to allege that the Pact,

> which was concealed from the Union, was actually an agreement forming "a de facto multi-employer association and/or bargaining coalition" and that from March 27, 1990, the first negotiating session, [the Distributors] bargained illegally as a multi-employer association or engaged in coalition bargaining, without the Union's consent. Thus, no valid impasse was reached. Furthermore, [the Distributors'] multiemployer or coalition bargaining was "bad faith and/or surface bargaining," but only from October 3, 1990, which was 6 months prior to the filing of the charge.

Over the Distributors' objection, the administrative law judge ("ALJ") granted the General Counsel's motion to amend the complaint.[6]

After a lengthy hearing, the ALJ ruled in favor of the General Counsel in an opinion dated December 1, 1994. The ALJ found that the Pact created an unlawful multi-employer bargaining collective that rendered the entire course of the Distributors' conduct toward the Union unlawful. Accordingly, the ALJ ordered "that all Respondents . . . rescind the February 7 and April 15, 1991 im-

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[6] Among other things, the Disitributors argued that the proposed amendment was time-barred by the six-month limitations period applicable to charges of unfair labor practices under the NLRA. The ALJ concluded that the amendment was not time barred, both because the Distributors had fraudulently concealed the existence and substance of the Pact, and because the multiemployer-bargaining allegation was closely related to the original allegations of the complaint.

plementations of the last, best, and final offers and restore all terms and conditions of employment to the status quo before the unilateral changes, to the extent that such were detrimental to its employees. That includes eliminating the new casual employee classification and probationary employee clause and making whole those employees who were affected by Respondents' illegal implementations. . . . I shall order Powers to remove that discipline [for violation of the new "can bag" policy] from the employees' personnel files . . . ."

In a decision and order dated November 8, 1996, a three-member panel of the NLRB essentially adopted the reasoning and order of the ALJ. The Distributors' petition for review, and the NLRB's cross-petition for enforcement, followed shortly thereafter.

III

It is particularly appropriate, in light of the parties' radically divergent views of the record evidence, to emphasize before addressing the merits of this case that we must enforce the NLRB's order as long as it is supported by substantial evidence on the record viewed as whole, even if evidence also exists that possibly could support a conclusion different from that reached by the NLRB. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 497 (1951).

A

The NLRA requires employers to bargain in good faith with the designated representative of a defined bargaining unit of the employer's employees. *See* 29 U.S.C. § 158 (a)(5). The duty to bargain in good faith is limited to issues of wages, hours, and other terms and conditions of employment—the so-called mandatory subjects of bargaining. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210 (1964). However, when a party so strenuously refuses to bargain on a nonmandatory subject (such

as the scope of the bargaining unit) that the result is an impasse, that party violates Section 8(a)(5) of the NLRA. *See NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348-50 (1958).

Following the principle that an impasse caused by absolute insistence on a particular bargaining unit is a violation of the duty to bargain in good faith, the NLRB and the courts have held that "joint bargaining" or "multiemployer bargaining"—either by a group of employers who refuse to bargain separately, or by a group of separate employee bargaining units who refuse to do so—without the other party's consent constitutes unlawful insistence on a nonmandatory subject, namely, the expanded scope of the bargaining unit. *See, e.g., Utility Workers Local 111 (Ohio Power)*, 203 NLRB 230, 238 (1973), *enf'd*, 490 F.2d 1383 (6th Cir. 1974) (finding union to have violated NLRA by "insisting that final settlements of the collective-bargaining contracts covering separate units of employees of Ohio Power, Central Operating, and Wheeling Electric be withheld until final agreement was reached between the Respondents and the Employers in all the units in which the bargaining was taking place."). On the other hand, both the NLRB and the courts also have recognized that "coordinated bargaining," a practice whereby parties share information and coordinate efforts but ultimately retain the authority to negotiate contract terms individually, is lawful under the NLRA. *See, e.g., General Electric Co.*, 173 NLRB 253 (1968), *enf'd*, 412 F.2d 512, 514 (2d Cir. 1969).

The principal question presented by this case is whether the Pact created an unlawful multiemployer bargaining relationship among the Distributors, or whether the Pact merely reflected a lawful agreement to form a coordinated bargaining group within which each member would retain independent contract-making authority. There are no "magic words" that distinguish an agreement for un-

lawful multiemployer bargaining from a simple coordinated bargaining agreement. *See City Roofing Co.*, 222 NLRB 786, 789 (1976), *enf'd sub nom. NLRB v. R.O. Pyle Roofing Co.*, 560 F.2d 1370 (9th Cir. 1977). Instead, the task of a reviewing agency or court is to examine the totality of the circumstances surrounding the agreement to determine whether the signatories truly retain independent bargaining authority, or whether the group of signatories retains effective veto power over the bargaining behavior of individual group members. *See Utility Workers*, 203 NLRB at 239 ("a policy such as uniformity, innocent in and of itself, can in context become a vital part of an illegal pattern of conduct").

Here, the record is replete with evidence that the Distributors in fact conducted unlawful multiemployer bargaining. For example, while the Pact specified several seemingly flexible bargaining goals, it also laid down several specific non-negotiable contract terms applicable to all Pact signatories. *See supra*, at 5-6 (specifying, for example, "[c]ooler and basement deliveries required," "no curfew," "no restrictions on number of part-time employees," and "common expiration date"). The Pact further provided a huge financial penalty to any Distributor that either deviated from any of the specific contract terms or negotiated directly with the Union; such a Distributor would have to pay $400,000 to each other party to the Pact, a total of $1.6 million for each violation.[7] Perhaps most tellingly, no Distributor ever offered a contract proposal different from that offered by every other Distributor; even when the Union made a proposal addressing an issue unique to a particular Distributor, an identical counterproposal was always forthcoming from all six Distributors.

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[7] Because Don Lee (Warren) and Don Lee (Dearborn) were owned by the same parent company, they collectively count as only one Distributor for purposes of the Pact.

Against this factual backdrop, the Distributors argue that the Pact in fact reflected only an innocent coordinated-bargaining strategy. The Distributors advance three principal arguments: first, they argue that the Pact did not actually confer "veto" power on the collective; second, they assert that, contrary to the ALJ's finding, the Distributors did not "reach[] an agreement . . . about exactly what they wanted" in the Pact; and third, they contend that the Pact's requirement that the Distributors not negotiate "directly" with the Union did not necessarily preclude individual Distributors from reaching individual agreements with the Union. The Distributors' arguments misapprehend the scope of substantial-evidence review. The ALJ's conclusion that the Pact effectively conferred collective veto power on the Distributors is supported both by the Pact language imposing a $1.6 million fine on any Distributor that reached an agreement with the Union inconsistent with the express provisions set out in the Pact, and by the fact that no Distributor provided an individual offer (even in the face of Distributor-unique proposals offered by the Union). With respect to the ALJ's finding that the Pact reflected an *ex ante* agreement on "exactly" what the Distributors wanted in their contracts, it is true that some of the Pact's contract provisions are vague (*e.g.*, "[m]ore restrictive grievance procedure"); however, other provisions are quite specific and leave no room for negotiation (*e.g.*, "[n]o curfew"). Finally, on the issue of whether the "no direct negotiation" clause precluded individual Distributors from reaching individual agreements with the Union, the ALJ certainly was entitled to infer from the Distributors' actual behavior that the Pact precluded such agreements. The fact is that, even when presented with Distributor-specific proposals that had no application or relevance to any other Distributor, each of the six Distributors responded with an identical counterproposal. On this record, there is at least substantial evidence—we would be more likely

to call it overwhelming evidence—that the Distributors were engaged in unlawful multiemployer bargaining without the Union's consent.

B

The Distributors' secondary argument is that, even if their conduct constituted unlawful multiemployer bargaining, the General Counsel's complaint focusing on this charge was untimely. Section 10(b) of the NLRA provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. . . ." 29 U.S.C. § 160(b). "[T]he intended purpose of [Section 10(b)] is that, in the absence of a properly served charge on file, a party is assured that on any given day its liability under the Act is extinguished for any activities occurring more than six months before." *Chemung Contracting Corp.*, 291 NLRB 773, 774 (1988). Here, the Distributors argue that the multiemployer-bargaining charge is time barred because the Union should have been aware of the Pact by July 1990, but did not lodge a complaint with the Regional Director until April 1991. Alternatively, the Distributors argue that the six-month limitations period ran between the date on which the Regional Director declined to file a complaint on the multiemployer-bargaining issue (October 1991) and the date on which the issue was revived via the General Counsel's motion to amend (February 1993). In response, the NLRB argues that it is entitled to tolling of the limitations period both because the multiemployer-bargaining allegation is closely related to other, timely-filed allegations contained in the complaint, and because the Distributors fraudulently concealed the substance of the Pact during the entire course of collective bargaining.

There are at least two generally recognized exceptions to the six-month filing rule. First, a complaint may be amended to add allegations relating to conduct more than

six months old as long as the conduct occurred no more than six months before the filing of the charge underlying the complaint, and as long as the allegations in the amendment are closely related to that charge. *See, e.g., Henry Bierce Co. v. NLRB,* 23 F.3d 1101, 1108 n.1 (6th Cir. 1994); *Truck Drivers & Helpers Union, Local No. 170 v. NLRB,* 993 F.2d 990, 1000 (1st Cir. 1993). Relying on its decision in *Redd-I, Inc.,* 290 NLRB 1115 (1988), the NLRB ruled here that the multiemployer-bargaining amendment was timely because it was closely related to the original charge's allegation of unilateral implementation of employment conditions before a bona fide impasse was reached. The NLRB reasoned that "the joint bargaining allegation is of the same class of violations in that it concerns negotiating conduct governed by Section 8(a)(5) of the Act; it involves the same factual setting and sequence of events, in that all the theories call for analysis of the entire course of bargaining; and the Respondents raised virtually the same defenses."

The Distributors' primary argument against application of the "closely related" exception to the six-month limitations period is that the date on which the Pact was signed (January 18, 1990) was almost 15 months before the date on which the original charge was filed (April 3, 1991). This argument is nonresponsive. The Union's complaint is based not on the Distributors' act of signing the Pact, but on their behavior during the entire course of collective bargaining. It is undisputed that the alleged unfair labor practice of bargaining without disclosing the terms of a multiemployer-bargaining agreement occurred within six months of the date on which the original charge was filed, and therefore we are not persuaded by the Distributors' primary argument. Secondarily, the Distributors assert that there is insufficient factual commonality between the multiemployer-bargaining charge and the charges contained in the original complaint to support a "closely related" finding. Under the substantial evidence test, how-

ever, we must affirm the NLRB's decision because the record demonstrates that the amendment involved the same statutory provision, required assessment of the same Distributor conduct implicated in the original complaint charges, and demanded consideration of the same evidence. The amendment, after all, need not be identical to the charges contained in the original complaint; it need only be "closely related," and the NLRB has shown substantial evidence here that it is. *Cf. United States Can Co. v. NLRB*, 984 F.2d 864, 867 (7th Cir. 1993) (affirming NLRB's finding that amendment was "closely related" to original complaint allegations because substantial evidence supported agency's finding that new allegations involved same basic employer conduct as old allegations).

The second generally recognized exception to the six-month filing requirement is fraud, and we would be hard-pressed to disagree with the NLRB's finding that the Distributors fraudulently concealed the terms of the Pact. Fraudulent concealment of a material fact underlying an unfair-labor-practice charge tolls the six-month limitations period. *See, e.g., Ducane Heating Corp.*, 273 NLRB 1389, 1390 (1985), *enf'd*, 785 F.2d 304 (4th Cir. 1986); *cf. Davis v. Smith's Transfer, Inc.*, 841 F.2d 139, 140 (6th Cir. 1988) (recognizing fraudulent concealment doctrine but finding facts insufficient to toll limitations period). Here, the facts could scarcely be stronger in support of the NLRB's finding of fraudulent concealment. The Union repeatedly asked about the existence of a mutual aid pact, beginning with the very first collective bargaining session. The Distributors' responses were generally evasive (*e.g.*, Long's statement to Knox that the existence of the Pact was "none of his business and that it was not relevant to bargaining," *see* J.A. at 1556), and were sometimes downright untruthful (*e.g.*, the statement of two Distributor representatives that there was no mutual aid pact at all, *see id.* at 1780). During the Regional Director's investigation, no copy of the Pact was produced; it was not

until an administrative subpoena was issued in connection with the hearing before the ALJ that anyone other than the Distributors saw the text of the Pact.

Even were we inclined to accept the Distributors' argument that the Union was on notice of the *existence* of some agreement, the record makes absolutely plain that the Distributors kept the terms of the Pact a closely-held secret. Not only did the Distributors go so far as to ignore a subpoena in another proceeding demanding production of a copy of the Pact, but Long and his associates flagrantly misrepresented the Pact's terms—going so far as to say, for example, that there was no penalty to any Distributor for negotiating directly with the Union or for using a negotiator other than West Coast, *see* J.A. at 1674, when the Pact clearly prohibited such acts on pain of a substantial financial penalty. In the face of these facts the Distributors' main argument against invocation of the fraud exception—that "[t]he Union and the General Counsel failed to exercise due diligence"—borders on the disingenuous. Moreover, it is no answer to say that the Union possibly knew that a pact existed when they clearly did not know its terms; the Union had no way to ascertain whether the Pact provided for lawful coordinated bargaining or unlawful multiemployer bargaining without knowing its precise terms. Accordingly, we hold that the NLRB correctly invoked the fraudulent concealment doctrine and properly permitted the complaint as amended to go forward.

C

The parties raise a number of other issues: the Union argues that Powers Distributing's unilateral "can bag" policy was unlawful (independent of the legality of the Pact) and that certain conditions imposed by some of the Distributors were inconsistent with the Distributors' final offers, and the Distributors argue that the Union's own bad faith during the course of the collective bargaining precludes a finding against the Distributors. Because we

affirm the NLRB's order finding that the Distributors' entire course of conduct was unlawful, and therefore that no valid impasse was reached that would permit any Distributor to implement a "final offer" unilaterally, we need not address the Union's arguments. With respect to the Distributors' argument, we agree with the District of Columbia Circuit that where a party to collective bargaining imposes an unlawful precondition to bargaining—as here, where the Distributors essentially conditioned bargaining on the Union's acceptance of the Distributors' multi-employer bargaining unit—that party's conduct excuses the other party's obligation to bargain in good faith. *See Local 777, Democratic U. Organizing Comm. v. NLRB*, 603 F.2d 862, 911 (D.C. Cir. 1978).[8] The essence of the NLRB's ruling in this case is that, by secretly entering into a pact that restricted the right of the individual Distributors to negotiate with the Union, the Distributors collectively had agreed in advance not to budge on a non-mandatory bargaining subject. The Union's subsequent bad faith, if there were such, is therefore irrelevant.

IV

For the foregoing reasons, the Distributors' petition for review of the NLRB's order is DENIED, and the NLRB's petition to enforce its order is GRANTED.

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[8] Unlike this case, the District of Columbia Circuit was confronted with a situation where the union, rather than the employer, imposed the unlawful precondition. The principle, however, is the same. Translating the District of Columbia Circuit's reasoning into the context of this case, we hold that "if [an employer] insists on speaking on behalf of persons for whom it cannot properly so insist, [a union] cannot be faulted for refusing to bargain." *Local 777*, 603 F.2d at 911 (quoting *NLRB v. Kelley Bros. Nurseries, Inc.*, 341 F.2d 433, 440 (2d Cir. 1965) (Friendly, J.)).

AGREEMENT

THIS AGREEMENT is entered into by and between DON LEE DISTRIBUTOR, INC., POWERS DISTRIBUTING COMPANY, INC., HUBERT DISTRIBUTORS, INC., OAK DISTRIBUTING COMPANY, INC., KOZAK DIST., INC., EASTOWN DISTRIBUTORS CO., (thereafter, each to be referred to as Distributor) and shall relate to collective bargaining with Teamsters Local # 1038 of Detroit, Michigan.

WHEREAS, each of the foregoing is a Distributor of beverages and an Employer of employees represented by Teamsters Local # 1038 (hereafter "Union") which has a collective bargaining Agreement with each Distributor and;

WHEREAS, each Distributor is desirous of correcting and/or improving the language and economics of its respective collective bargaining Agreement with said Union to reflect more nearly market supply and demand conditions, to correct unreasonable health & welfare and pension costs for the benefits received and to negotiate improvements in operational efficiencies, and;

WHEREAS, the Union has had a history of striking or bringing pressure to bear on certain Distributors or certain groups of Distributors to force bad Agreements on all Distributors that are fraught with operational inefficiencies, featherbedding practices, excessive costs and practices which restrict and hamper Distributors rights, and;

WHEREAS, each Distributor can offset the Union's bargaining power by entering into a mutual aid agreement and coordinated bargaining effort.

THEREFORE, IT IS AGREED AS FOLLOWS:

1. Each Distributor shall enter into its own Agreement with the Union. Nothing contained herein shall be construed to reflect a multi-employer association nor create a multi-employer unit. This document reflects

a coordinated bargaining effort among individual and independent Distributors.

2. Each Distributor shall share costs and expenses of Fred R. Long and his associates who shall represent the Distributors bargaining efforts with the Union and cover the following services.

   A. Prepare for negotiations with the Union.

   B. Conduct negotiations with the Union.

   C. Prepare each Distributor to be able to effectively take and win a strike should the Union call one.

   D. Prepare a public relations strategy and effort to counter any Union effort to boycott a Distributors' product lines or to otherwise discredit any Distributor.

   E. Prepare an informational campaign to customers of Distributors (i.e., retailers) to keep them alert to Union ploys and advise them of their rights and powers under the law.

   F. Represent Distributors in Unfair Labor Practice charges or law suits filed against the Union or defending Union Unfair Labor Practice charges and/or suits filed against the Distributor(s) or its agent(s).

   G. Assist Distributors in resolving employee job actions, if any.

   H. Other services a majority of Distributors to this Agreement may authorize.

   Such costs shall be shared by Distributors based on the formula as noted in Exhibit A attached and made part of this Agreement by reference.

3. Each Distributor shall share the costs and expenses of any strike called against one, some or all Distributors which costs shall include security services and legal

services covering the facilities as well as the equipment at the facility and on the road (provided the Distributor shall not have violated a State or Federal law or regulation in which case that element of cost involved in the violation shall be born solely by the distributor who committed the violation).

Such costs shall be shared by Distributors based on the formula as noted in Exhibit A attached and made part of this Agreement by reference.

4. Each Distributor shall participate in and fund any media or public relations campaign for the purpose of advising the public and customers of the status of Union activity or to counter any Union effort to discredit any or all distributors. The fund will not exceed $100,000 without approval of the negotiating wholesalers. All expenditures are to be approved by the group.

   Such costs shall be shared by Distributors based on the formula as noted in Exhibit A attached and made part of this Agreement by reference.

5. Each Distributor in the event the Union calls a strike against any one, some or all Distributors shall take no action inconsistent with the purpose of this Agreement; nor shall any Distributor not struck seek to take advantage of said strike conditions to the detriment of the struck Distributor or any of them.

6. Shared costs as described in exhibit A shall only apply, in the event of a strike against any one, some or all Distributors for a period of ninety (90) calendar days from when the strike against any one, some or all commenced. After ninety (90) days from the onset of any strike, all strike related expenses shall be borne by the Wholesaler affected.

7. Distributors agree to the establishment of the minimum objectives, described in exhibit B, for a new

Collective Bargaining Agreement which can only be changed by a majority vote of the participating Distributors.

8. In the event any Distributor is in breach of this Agreement or negotiates directly with the Union (or any other Union or person or group who allegedly is representing this Union's Interest) or agrees to settle on terms and conditions in excess of those listed in item 7 herein above, that Distributor, in addition to any other damages for breach of this Agreement that may occur in any enforcement law suit brought by any of the other Distributions shall, in addition, pay to each of the other Distributors a penalty fee of $400,000 to each.

9. This Agreement may be enforced in any court of competent jurisdiction located with the State of Michigan and is enforceable pursuant to the laws of Michigan.

The parties acknowledge that they have carefully read this Agreement and understand their respective obligations under the Agreement and agree to be bound by its terms by affixing their signatures hereto this 18 day of January, 1990.

DON LEE DISTRIBUTOR, INC.	POWERS DISTRIBUTORS CO., INC.
by /s/ Donald L. Klopcic	by /s/ Gerald B. Powers
HUBERT DISTRIBUTORS, INC.	OAK DISTRIBUTING CO., INC.
by /s/ Alice Shotwell Gustafson	by /s/ Robert H. Baetens
KOZAK DIST., INC.	EASTOWN DISTRIBUTORS COMPANY
by _____	by /s/ James R. Quasarano

EXHIBIT A

Formula for Exhibit A will be each distributor's percentage share of total 24/12 case equivalent volume for calendar year 1989 as it relates to the total volume of the group.

	Cases	%
Don Lee Distributor, Inc.	5,751,010	27.9
Oak Distributing Co.	1,430,971	6.9
Eastown Distributors Co.	2,964,552	14.4
Powers Distributing Co.	5,290,446	25.6
Hubert Distributors, Inc.	3,410,254	16.5
Kozak Dist., Inc.	1,790,350	8.7
	20,637,583	100.0%

EXHIBIT B

1. Eliminate eight (8) hour minimum/maximum day.
2. Remove load limit.
3. Overtime after forty (40) hours per week.
4. Management rights clause.
5. More restrictive grievance procedure.
6. Single pay holidays.
7. Simplified vacation language.
8. Four (4) weeks maximum vacation, red circle everyone over.
9. Cooler and basement deliveries required.
10. Reduction in wages.
11. Refined benefit pension plan—percentage of earnings.
12. Insurance revisions.
13. No curfew.
14. Bulk deliveries.
15. Zipper clause.
16. Empty pick up rate.
17. Longer probation period.
18. No restrictions on number of part-time employees.
19. Reduction on commission when helper is used.
20. More flexibility with reclamation duties.
21. Common expiration date.
22. Minimum three year contract.

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Donald Klopcic, Jr.
Don Lee Distributors
14301 Prospect
Dearborn, MI 48216

Request therefor having been duly made by Local 1038 of the National Conference of Brewery and Softdrink Workers, IBT whose address is 2741 Trumbull Avenue, Detroit, MI 48216

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE a Hearing Officer of the National Labor Relations Board, at Room 300, Patrick V. McNamara Federal Bldg., 477 Michigan Avenue in the City of Detroit, Michigan on the 8th day of March, 1990, at 9:00 o'clock a.m. of that day, to testify in the Matter of

Don Lee Distributor, Inc.
Case No. 7-UC-374

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

See attached sheet.

B-37283

[NLRB logo

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto authorized the issuance hereof.

Issued at Detroit, Michigan this 1st day of March 1990.

/s/ Mary Cracraft

NOTICE TO WITNESS.—Witness fees for attendance, subsistence, and mileage, under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

ATTACHMENT TO SUBPOENA DUCES TECUM TO DONALD L. KLOPCIC, JR. IN NLRB CASE NO. 7-UC-374

The information and documents requested in each paragraph listed below pertain to both the Dearborn and Pontiac facilities of Don Lee Distributor, Inc. The term "Employer" also refers to Don Lee Distributor, Inc. and both its Pontiac and Dearborn facilities.

1. Payroll records for all employees covered by the Employer's collective bargaining agreement with Teamsters Local 1038 for the period January 1, 1987 to the present.

2. Any and all records demonstrating ownership and/or control of the Employer for the period January 1, 1987 to the present.

3. The Employer's Articles of Incorporation and any amendments thereto.

4. For the last 3 fiscal years, the Employer's Annual Reports, its State, Federal and Municipal income tax returns, and its annual, semi-annual and quarterly balance sheets and revenue statements. Please include records of any and all intra-corporate cancellations, intra-corporate balancing statements and intra-corporate transactions.

5. Any records demonstrating the flow chart or chain of command at the Employer's facilities for the period January 1, 1987 to the present.

6. Rosters or any similar documents listing the names of all individuals working for the Employer and their respective jobs, classifications and titles including managerial, supervisory, clerical and sales employees as well as employees covered by the collective bargaining agreement with Teamsters Local 1038.

7. Any and all records or documentation of beer orders for the period January 1, 1989 to the present.

8. Any and all records of transfers of beer or wine inventory between the Employer's Pontiac and Dearborn facilities for the period January 1, 1987 to the present.

9. Any and all records such as purchase agreements, titles, leases, contracts, or similar documents pursuant to which the Employer owns or is furnished beer delivery trucks for the period January 1, 1987 to the present. Additionally, any and all records documenting whether or not trucks are assigned to the Dearborn facility or the Pontiac facility and any changes in such assignment of trucks.

10. Any and all documents registering and licensing beer delivery trucks for the period January 1, 1987 to the present.

11. Any and all records of motor vehicle insurance for the beer delivery trucks for the period January 1, 1987 to the present.

12. Any and all records of Employer payments for health insurance and medical bills for employees covered by the collective bargaining agreement with Teamsters Local 1038 for the period January 1, 1989 to the present.

13. Copies of any life insurance plans, health insurance plans, disability insurance plans and summary descriptions of any such plans for the period January 1, 1989 to the present.

14. Payroll records for Bob Morris for the period January 1, 1988 to the present.

15. Payroll records for employee P. McCusker for the period January 1, 1988 to the present.

16. The power of attorney and any additional documents or records pertaining to the Employer's participation in the DDOM Wholesalers' Association for the period January 1, 1987 to the present including any documents describing the Employer's present relationship to the DDOM.

17. Any and all documents such as powers of attorney, contracts, agreements, memoranda or similar documents pertaining to the Employer's membership or participation in *any* employer association or to the Employer's assignment of bargaining and/or representational rights and/or responsibilities to any such employer association or entity or individual including West Coast Industrial Relations, Fred Long, Patrick Jordan or thg firm of McLaughlin and Irvin from January 1, 1988 to the present.

18. A list of each and every employee classified or performing the work of a "truck counter" and/or "truck porter" for the period January 1, 1987 to the present. Additionally, for the period January 1, 1987 to the present, please provide any and all memoranda, handbooks, policy manuals, correspondence or similar documents containing a description of the classifications or jobs of "truck counters" and/or "truck porters."

19. Complete employment records for each and every employee performing the job of "truck counter" and/or "truck porter" for the period January 1, 1987 to the present including such records which show date of hire, rate of pay, payroll ledger, changes in pay, insurance coverage, hours of work, and records of any and all fringe benefits.

20. Records of contracts, agreements or similar documents for the distribution of beer and wine between the Employer and its customers for the period January 1, 1989 to the present.

21. Records of purchase of beer, wine and other beverages between the Employer and producers for the period January 1, 1989 to the present.

22. Any and all documents, records, invoices, payments, leases and/or contracts between the Employer and Wayne Hunt Trucking for the period January 1, 1989 to the present.

23. Any and all records demonstrating name(s) of the Employer's accountant(s), attorney(ies) and others providing professional services to the Employer, including any employer association or other person rendering labor relations, consulting, or related services to the Employer for the period January 1, 1987 to the present.

24. Any and all records of trucking or shipping services purchased by the Employer from outside entities and/or persons for the period January 1, 1989 to the present.

25. The Employer's general ledger for the period January 1, 1989 to the present.

26. Any records, documentation or ledgers reflecting the Employer's accounts payable for the period January 1, 1989 to the present.

27. Any records, documentation or ledgers reflecting the Employer's accounts receivable for the period January 1, 1989 to the present.

28. Records of workers' compensation insurance, fire and theft insurance, property insurance, unemployment insurance for the period January 1, 1989 to the present.

29. Any contracts, agreements or similar documents by and between the Employer and its suppliers (e.g. uniforms, maintenance service, landscaping services,

vending services, etc.) for the period January 1, 1989 to the present.

30. Any and all employment records of any employee of the Employer, (including employees who are not covered by the collective bargaining agreement with Teamsters Local 1038) who has worked at both the Pontiac and the Dearborn facilities of the Employer for the period January 1, 1987 to the present including such records which show the respective date or dates when each such individual worked at each facility.

DONALD KLOPCIC, JR., TESTIMONY BEFORE THE ALJ

[1563] Q. Mr. Van Goethem was present as the representative or a representative of the Don Lee facilities at each of the meetings that were held with Fred Long in 1990?

A. Was he a— Excuse me. Repeat that, please?

Q. All right. You testified that you attended on more meetings held with Fred Long during the months of January and February, 1990, correct?

A. Correct.

Q. Was Mr. Van Goethem at each of the meetings that you attended?

A. I don't recall.

Q. At some point during the month of January, 1990, you signed on behalf of both Don Lee facilities an agreement regarding the 1990 negotiations, correct?

A. Correct.

Q. And was that agreement signed at a meeting held with Mr. Long?

A. The document that you showed me before?

Q. No. Let me show you the document. I'm showing you what's been received in evidence as General Counsel's 18. Is that the agreement that you signed on January 18th of 1990?

A. Yes, it is.

Q. On behalf of both the Don Lee facilities, correct?

A. Correct.

Q. Now, Mr. Klopcic, you, in response to a question by the [1564] judge, indicated that you always sign your name Don Lee—Don L. Klopcic, Jr. Is there some reason that the Jr. is not indicated on your signature on this document?

A. No. That's my signature.

Q. Okay. Now was this document signed during one of the meetings with Mr. Long in January of 1990?

A. I don't recall if Fred was a the meeting when we signed this or not with the wholesaler group.

Q. Okay. Did everyone sign at the same time?

A. Everyone signed at the same time.

Q. You saw the other distributors—

A. That signed.

Q. —put their signatures on the document? Was Mr. Van Goethen present at that meeting where the document was signed?

A. I don't recall.

Q. All right. Sometime after the document was signed and after you sent the January 15th letter to Mr. Knox, requesting separate negotiations, the union did thereafter refuse to agree to separate the Don Lee (Dearborn) and Don Lee (Pontiac) facilities, correct?

A. Correct.

Q. And, as a result of that refusal, the employer, Don Lee (Dearborn)/Don Lee (Pontiac), petitioned the NLRB to resolve the issue via a unit clarification hearing, correct?

A. That's correct.

* * * *

[1565] That's what I testified to, yes.

Q. Okay. Mr. McKnight also asked you at the unit clarification hearing whether anybody on behalf of Don Lee had executed a power of attorney or similar document for purposes of the 1990 negotiations, correct?

A. That's line what? 22, 22?

Q. Yes.

MR. LONG: Of which page?

MS. PAPPAS: 111.

MR. LONG: Thank you.

BY MS. PAPPAS:

A. That's correct.

Q. And you testified under oath that the answer was no, correct?

A. Correct.

Q. All right. Since you're having trouble to recall, I will ask you to, before I ask my question, read page 112 from the top through Line 9.

A. I've read it.

Q. All right. Mr. McKnight asked you at the UC hearing whether you had executed a power of attorney or similar document giving certain powers to West Coast Industrial Relations Association, correct?

A. Correct.

Q. And, again, you testified under oath that the answer

* * * *

ROBERT VAN GOETHEM TESTIMONY BEFORE THE ALJ

[1601] A. Correct.

Q. All right. Mr. McKnight asked you, in addition, at the UC hearing, whether Don Lee Distributor had signed any kind of document memorializing the fact that it was going to bargain as part of a group regarding 1990 negotiations, correct?

A. Yes.

Q. All right. And you testified under oath that you did not know, correct?

A. Correct.

Q. You told Mr. McKnight under oath that Don Klopcic, Jr. would know the answer to that question, correct?

A. Correct.

Q. Mr. Knight also asked you whether Don Klopcic, Jr. had signed any kind of document which was similar to the power of attorney executed by him in 1987, correct? I direct your attention to Page 32.

A. Yes, he asked me that.

Q. All right. And you testified under oath that you weren't aware of that, correct?

A. Yes.

Q. Mr. Van Goethem, in your position with the two Don Lee facilities, does Mr. Klopcic give you legal documents relative to the operations of the company to retain in your possession?

A. Sometimes.

Q. And what kind of documents can you recall that he's

* * * *

WEST COAST INDUSTRIAL RELATIONS
ASSOCIATION, INC.
170 Knowles Drive, Suite 270
Los Gatos, CA 95030-1833

Strictly Personal and Confidential

MEMO TO: Oak, Don Lee, Powers, Hubert & Eastown (via Federal Express)

FROM: Fred R. Long

DATE: March 23, 1990

SUBJECT: For Discussion At Wednesday's March 28, 1990 Meeting

Although my personal contact in Detroit lately has been limited to discussions with Thomas, Armstrong and Geist, I sense a slight tinge of paranoia in the embryonic state.

Some of you seem to be concerned about the fairness or generousness of our economic positioning. Some about relatively minor language issues. Some don't understand why Pat Jordan's involved (i.e., he's a Fred Long crony). Most of you are probably concerned with the slow bargaining start. All of these and many more are valid concerns, but keep in mind the principal reason you hired me is because your Detroit contracts are one big mess and the costs are eating you alive *and* we know the Teamsters and their tactics better than anyone else in our business *and* although we're expensive, we get the job done (especially if you prepare, have a little faith in us and keep your cool). You have also had to endure my absence from on-site Detroit activity because of an acute error made by medical science, to wit, they licensed two (2) quacks to practice medicine.

This memo is not intended as a critique of any of us. Frankly, once we got started, *all of you* have cooperated with us and worked hard and we have no complaints. I also realize our *very late start* was caused by doing our

best to get others to join with us in resolving once and for all, the Detroit/Knox/Teamster mess. For anyone doubting, those that did not join our group did not do so because we were too radical; they did not join *because they were afraid*!! That was the same psychological problem that caused the current state of affairs with Detroit/Knox/Teamsters.

What the five of you want in the form of a signed contract is to get economics, language and featherbedding where it should be if things had been done properly in negotiations over the years, not to bust the Union or punish employees! However, anyway you slice it, to accomplish these goals it will be necessary to eliminate the atrocious featherbedding language and implement some serious economic changes which better reflect what goes on elsewhere in the country, e.g., Chicago, Buffalo, etc.

Now, let's reflect on what probably is the thought process at this time.

1. Knox and the Teamsters are losing a lot of sleep (not wanting to risk their members and their dues) because WCIRA is involved. If Knox strikes all of us and loses, his Local folds and he is out of a job. If he strikes one of us (e.g., Don Lee) and loses, he's dead meat trying to get a deal with anyone else because Don Lee would be the new pattern (just like West Side is for Grand Rapids and other cities in Western Michigan). The Teamsters have *never* beaten WCIRA in a strike. The Teamster's International has advised Locals it may be a dangerous proposition (units could be decertified and union income lost) to strike a WCIRA client.

   Strategy Question #1. If you are Knox do you strike us? I don't think he will, but if he does I know we will have a "whopper" on our hands, because *Knox's survival* is at stake. I also know the Detroit Metropolitan Area is too big and has a historical Union mentality for us to operate the same way we would

in another city (e.g., Providence). Winning a strike in Detroit requires a media effort (Rietz); a legal effort locally (Crandall and friends who were recommended by Rob Powers; and if all hell breaks loose, we've got two other groups in the wings—one recommended by Alice Gustafson and the other a known quantity in Grand Rapids with prior experience in the areas we need that experience); a security effort (and you are deciding on those issues now); a benefits expert (and you have selected FlexBen); a comprehensive survey (WCIRA has provided); a project management team (Armstrong and Geist) to get you up to speed in strike preparation and assist you with problem resolution (e.g., employee job actions, NLRB matters, coordination amongst you, etc.).

2. Detroit Distributors have inevitably been perceived by Knox as easy to push around and out-maneuver. There is no doubt he knows this time he's in for a stormy ride. We know early on Knox has been discussing a new approach anticipating WCIRA's involvement and has been in contact with Harbrandt, the AFL-CIO corporate campaign strategist (courtesy of the FAX intercepted by Gustafson at Hubert). We know the highlight of such a campaign is to characterize our five distributors as greedy bastards hell bent to put drivers families on welfare using the evil WCIRA to do their dirty deeds.

   Stratgy Question #2. If we think Knox is afraid to strike us for fear of being defeated, is he not likely to drag out bargaining and pressure us with a corporate campaign? I believe we can expect this approach. However, as long as Knox can't conclusively prove WCIRA is involved, he doesn't have enough information to begin a corporate campaign. This is precisely why I brought in Pat Jordan. Initially to do the UC at Don Lee and RM at Powers. With that ongoing feint who better to establish bargaining dates

and protocol with Knox than Jordan. Knox has to be both frustrated and confused because although he knows WCIRA is lurking out there somewhere, he isn't sure yet on how he'll be attacked.

Meanwhile, Jordan, the son-of-a-bitch that he is, has put all kinds of pressure on Knox. Knox is used to having things his way and thats not happening! We are going to force him to meet with us during working time as well as on evenings and we are not going to meet with him at any Teamsters office. Have you done this before? We've already filed Refusal To Bargain Charges against Knox and we haven't met him face to face yet.

Meanwhile we have already structured and begun communications with the media and Knox is far behind because we know where we're going and he's not sure yet whether Jordan or someone else (WCIRA) will be the spokesman for substantive negotiations.

The reason we are not expanding this session beyond protocol is because we want to get as many dates set aside for bargaining as possible and if Knox refuses he'll have more problems with our unfair labor practices charges against him. Not a good way for Knox to start a corporate campaign against us. (As a sidelight, the reason I selected Jordan is several fold. I have worked with him frequently and am comfortable with his expertise and jugular vein instinct. I don't have to break a new attorney in who I'm not sure will perform up to my expectations. You can not find a better labor lawyer technically and tactically than Jordan. Jordan does not need this work. He's doing me the favor. Nor do I have any doubt that Jordan will intimidate Knox and Knox's attorney if he brings one.)

It is my intent, when we do make our first proposal to Knox, to highlight the elimination of the featherbedding issues and other contract language problems

and advise Knox that although Detroit's compensation is totally out of line, we will reserve our position on economics which shall remain "open" until we see how "he" responds to our desire to eliminate featherbedding and restrictive contract language.

3. Knox will be able to mobilize that which is left of the area labor movement behind him. At best this effort will be marginally effective in Wayne County probably in the form of a request to boycott certain products (i.e., Don Lee products). A boycott by labor in Oakland County could actually help sales. McComb County should be somewhere in between.

   Our media position should be (amongst others) that those Unions who support Knox are supporting featherbedding, corruption and causing other businesses to think twice before locating or expanding in Michigan. Michigan needs more jobs and better jobs and that won't happen if the Union's mentality doesn't change. How can Unions support $50,000 a year drivers with the lowest productivity in America Something is wrong with that thinking!

   Perhaps you're beginning to see why I've stressed the importance of media preparation and public relations.

4. Is it probable that Knox will delay, delay, delay?

   I suspect that's what he'll do. His odds of winning a strike aren't good. As long as he's able to he'll do whatever he can to delay an impasse. He'll try to use his political and labor buddies to pressure you and say without WCIRA we could make you such a deal! He'll rely on your lack of patience and your costs for us and others to defeat your resolve. He'll tell his employees they must have patience. This seems to be the safest approach for Knox to keep getting dues from members and therefore keeps his job.

   The problem he has is what to do with the non-WCIRA represented distributors during this time

period. I've been told he's already offered a six (6) month extension if they don't select WCIRA as their representative. I suspect he may continue that practice. However, should we reach impasse and implement that will create tremendous pressure on the other distributors and Union if their contracts are not yet settled.

5. The foregoing is speculative, but conveys to you my thinking process and inducement for you to be prepared for any eventuality.

   However, it should take the edge off your concerns about *perfecting a final offer* amongst you. If our offer were 50% more generous than it is today, but only 10% less than what it was in the expiring contract, Knox won't accept it. Politically he'd rather see us implement the final offer *you want* than be accused by his members of agreeing to modest cuts. Politically he can survive longer if we are forced to implement cuts. In any event, we must be flexible if Knox does get reasonable and serious about reaching an agreement with us.

   If it becomes necessary to implement (presuming Knox will not make the concessions we need), we'll try to keep your costs as reasonable as we can without jeopardizing your preparedness. We will be able to shuffle step better when Knox's strategy becomes more clear to us. Right now I don't think he or anyone else in the Teamsters have any ideas how best to handle this mess Knox got himself into. That's why we are running into their delay tactics. Although you may not agree, the Knox delay tactics are helping us. We are catching up from our late start. That means we can be the one's constantly applying the pressure in the months to come.

6. The latest rumblings (the March 13, 1990 Union meeting and the Rob Powers—Celini meeting in Flor-

ida) would tend to support 5 above as probable. If Knox is ever in a position politically to accept an agreement with us it might take two (2) years. Our concern is how quickly we reach an impasse and savings (if an agreement is not possible as I believe).

In Conclusion

Digest this thinking. I'll be interested in your thoughts, ideas, concerns and comments at Wednesday's meeting. The better we communicate the better things will turn out.

I think it is significant that the contents of this letter shows *I clearly trust all of you!* It should be kept at your home for purposes of second guessing me at some time in the future, if I'm wrong. It should not be discussed beyond your specific need to know people. It should not be discussed with other distributors (i.e., Celini, Kozak); or anyone else beyond your need to know group.

It is also time for you to begin trusting me to do what's best for you given my knowledge and experience with unions in general and the Teamsters in particular. We want you to be successful as much as you want to be successful.

Sincerely,

/s/ Fred
FRED R. LONG

FRL:mjb

bcc: W. C. Thomas

TESTIMONY OF WILLIAM CHRIS THOMAS BEFORE THE ALJ

[2125] Q. Did you ask Mr. Long whether he thought the pact was encompassed by this request that Mr. Knox had made at the September 20th bargaining session?

A. No, the—the first time I talked to Mr. Long after he mentioned it to me in—in early June of '90 about that document, again, was after my meeting with Mr. Wollack, and I asked to see the document and reviewed it. That's the first time I saw its contents and talked to him about it.

JUDGE SCHLESINGER: The testimony is you had never seen it—uh—

THE WITNESS: Prior to—

JUDGE SCHLESINGER: —before that?

THE WITNESS: —prior to the meeting—Mr. Wollack's request, I had never seen it.

BY MS. PAPPAS:

Q. In response to Mr. Wollack's request at the July 12th, 1991 bargaining session, you asked him whether if you produced those documents—the pact—the union would agree to bargain on a group basis, and you—

A. I did.

Q. —pardon me?

A. I did.

Q. You understood that the pact had something to do with bargaining as a group?

[2126] A. No, the—what I understood was that Bob had asked for separate bargaining. I'm saying—when I —when I said that to Steve I was saying, if I give you this, will you agree to bargain on a joint basis so that we can expedite this process? And I think his response was, I don't know.

Q. You had never seen the document up to that—at—as of that point in time, correct?

A. That's correct.

Q. You had no idea what the specifics of its content were, correct?

A. The only thing that I knew about the content was the fee schedule as I had helped Mr. Long on certain billings.

Q. And yet in response to Mr. Wollack's request, you queried whether if you turned over the document the union would agree to bargain on a group basis?

A. I did.

JUDGE SCHLESINGER: Why did you ask him that?

THE WITNESS: Because I wanted—I wanted to get back into a—into a coordinated format to expedite the bargaining. The union had insisted upon this individual bargaining and I figure, okay, if I get this for him and get it to him, will he agree to bargain on it on a coordinated basis to expedite the process. That was—that was my intent at the time that I made those [2127] statements.

BY MS. PAPPAS:

Q. If you knew nothing about what the document said, Mr. Thomas, and you had never seen it before, then why would you have thought that turning over the document to the union would have prompted their agreement to bargain on a group basis?

A. Because this—they considered this to be an important document and I figure if I—said if I got that for you, would you bargain on a group basis. That was the basis of my statement.

Q In response to any other of their information requests prior to that time, had you countered with if I give you this piece of information will you bargain on a group basis?

A. I don't think so.

Q. It was only when Mr. Wollack made the request for any agreement between the companies that you countered with an inquiry as to whether that document would allow the union to bargain on a group basis, correct?

A. Yes.

C. At the December—or, I'm sorry, September 20th bargaining session, I believe you testified the union initially presented a proposal on Article 1. Do you recall that testimony?

* * * *

WEST COAST INDUSTRIAL RELATIONS
ASSOCIATION, INC.
170 Knowles Drive, Suite 210
Los Gatos, CA 95030-1833

Federal Express #1985151910

July 6, 1992

Mr. Walter Meyer
Acting Director, Office of Appeals
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, DC 202570-0001

Re: Local 1038 Teamsters and Detroit Beer Distributors —7-CB-8495; 7-CB-8541; 7-CB-8685; 7-CB-8541 (Amended); 7-CB-8778; 7-CB-8871 and 7-CA-31719 (2)-(7)

Dear Mr. Meyer:

The subject cases have been in Appeals for about ten (10) months now. I'm told the June 9, 1992 oral presentation by the union on subject cases was postponed because of the unavailability of the union's lead counsel.

I am mindful that Mary Shanklin was the party of contact when all this began. However, I am very concerned that we get decisions from your Division on these issues without further delay for these reasons:

1. My clients are substantially at risk (in the millions of dollars) and that potential liability grows daily.
2. All parties to the case set for trial have agreed to a September 21, 1992 trial date. Although the union's attorney, Sam McKnight, Esq. and I have attempted to settle this case, we have failed. It's not going to settle.
3. We need a decision so we know what it is we are going to be litigating. All parties have to prepare for

trial and time is growing short. Further delay in getting decisions on the issues will have a serious and negative impact on all parties.

In an effort to make it easier for you to refresh your recollection on what's involved in these cases, I have digested them for your benefit by time frame:

7-CB-8495—Regional Director found union violated § 8(b)(3) of the Act by refusing to provide information requested by Employer. [Unilateral settlement by RD is being appealed by Employers.]

7-CB-8541—Regional Director found union engaged in surface bargaining from March 1990 through January 1991, violating § 8(b)(3) of the Act. [Unilateral settlement by RD is being appealed by Employer.]

7-CB-8685—Regional Director found union engaged in bad faith bargaining violating § 8(b)(3) of the Act. [Unilateral settlement by RD is being appealed by Employers.]

7-CB-8541—Employers allege union continued to engage in surface bargaining by offering second complete counter proposal (in the series of bargaining sessions *immediately after* RD found union had engaged in surface bargaining through January 1991) more regressive than its only other proposal (its initial proposal made in March 1990) including for the first time the raising of non-mandatory subjects of bargaining (a year after bargaining began). [RD dismisses and Employer's appeal on ground union's conduct is nothing more than a continuing pattern of improper conduct and not an isolated incident as RD determed].

7-CB-8778—Employers allege union (at June 12, 1991 bargaining session) flatly refused to negotiate over mandatory subjects of bargaining including those lawfully implemented on February 7, 1991. [RD dismisses stating that issuing a complaint would not serve the purposes of

the Act since union agreed—*after* Employer filed the subject charge—it would negotiate on these subjects at the bargaining session on July 13, 1991. Employer has appealed on ground union's conduct is nothing more than a continuing pattern of improper conduct and not an isolated incident as RD determined.]

7-CB-8871—Employers allege union refused to discuss (at August 21, 1991 bargaining session) and has continued to refuse to discuss (since September 13, 1990) any part of Employers Last Best and Final Offer. [RD dismisses on theory that union's demand that Employers rescind both their February 7, 1991 and April 15, 1991 implementations of their final offer with no discussion of specifics satisfied union's obligation to discuss mandatory subjects of bargaining. Employer has appealed on ground union's conduct is nothing more than a continuing pattern of improper conduct and not an isolated incident as RD determined.]

7-CA-31719(2)-(7)—Union alleges Employers engaged in illegal coalition bargaining. Employers, at the very first bargaining session with union offered in writing to meet on either a coordinated basis or individual Employer basis with union. Union's initial written proposal to Employers in March 1990 was identical for all Employers. All prior agreements between union and Employer were identical in terms and condiitons for all Employers. Coordinated bargaining lasted from March to June 1990 whereupon union insisted all further meetings be by individual Employer only. Employers conceded to union demand although they told union its actions were designed to stall and prolong negotiations. Union alleges Employer had some kind of agreement making bargaining illegal. Although union could only speculate, Employers had only one agreement amongst them and that was a mutual aid pact sharing costs to pay negotiations, security protection if a strike occurred and related. None of the parties entered into any agreement that would restrict

their bargaining. However, all of them would periodically agree on common positions they wanted to take during negotiations so they couldn't be whipsawed by the union [RD investigated union's allegations and dismissed them.]

I am also enclosing an outline prepared by Peter Nash, Esq. (provided at Employer's December 13, 1991 oral presentation before General Counsel) that may be helpful to you in reviewing the issues involved.

I recognize you and the others in Washington are very busy people and I was reluctant to bother you. However, this is the only vehicle I know of short of Section 6(a) of the Administrative Procedure Act to try and get the ball rolling. Any effort by you to unplug the system will be greatly appreciated.

Sincerely,

/s/ Fred R. Long
FRED R. LONG, ESQ.

FRL:mjb

Enclosure

STATUTORY PROVISIONS

29 U.S.C. § 158:

Unfair labor practices

(a) It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * * *

(d) Obligations to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder. . . .

28 U.S.C. § 160(b) and (f):

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to filing of the charge with the Board and the service of a copy thereof

upon the person against whom such charge is made. . . . Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

* * * *

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals . . . by filing in such a court a written petition praying that the order of the Board be modified or set aside.

* * * *

Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

No. 98-594

(4)

Supreme Court, U.S.
FILED
DEC 31 1998
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

DON LEE DISTRIBUTOR, INC. (WARREN); DON LEE DISTRIBUTOR, INC. (DEARBORN); POWERS DISTRIBUTING COMPANY, INC.; EASTOWN DISTRIBUTORS, CO.; HUBERT DISTRIBUTORS, INC.; and OAK DISTRIBUTING CO.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondents.*

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038,

Intervenor.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI

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14PP

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Brown & Sharpe Mfg. Co., 321 N.L.R.B. 924 (1996), *aff'd, International Ass'n of Machinists and Aerospace Workers District Lodge 64 v. NLRB*, 130 F.3d 1083 (D.C. Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 2319 (1988) (*Brown & Sharpe III*) 3

Chemung Contracting Corp., 291 N.L.R.B. 773 (1988) 3

Chicago Tribune Co., 304 N.L.R.B. 259 (1991) 2

Gardner v. International Telegraph Employees Local No. 9, 850 F.2d 518 (9th Cir. 1988) 5

John Morrell & Co., 304 N.L.R.B. 896 (1991), *aff'd, United Food & Commercial Workers Union v. NLRB*, 998 F.2d 7 (D.C. Cir. 1993) 5

Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862 (D.C. Cir. 1978) 2

Redd-I, Inc., 290 N.L.R.B. 1115 (1988) 2

Truck Drivers & Helpers Local 170 v. NLRB (Girardi Distributors), 993 F.2d 990 (1st Cir. 1993) 4

Statutes

29 U.S.C. § 160(b) (1988)..... 1

Other

NLRB Casehandling Manual, Rule 11770 (Investigative Subpoenas)..... 6

INTRODUCTION

The National Labor Relations Board ("NLRB" or "Board") and Local 1038, Teamsters ("Union") ignore, but cannot escape, one essential point of law which brings this case to the Court: in its own words, the Union knew on July 12, 1991 that there was a "mutual assistance pact and/or agreement with respect to bargaining between and among the distributors," but did nothing about it. App. 178A (APX 643; GCX 143).[1] The Sixth Circuit applied the erroneous legal standard that "[f]raudulent concealment of a material fact underlying an unfair labor practice charge tolls the six-month limitations period," App. 21a, without regard to the Union's failure to exercise diligence after July 1991.

The question that merits the Court's review is whether an initial fraudulent concealment tolls the statute of limitations even after a party has, at a minimum, "inquiry notice" of the concealed facts. The Sixth Circuit answered the question in the affirmative and thereby materially altered the statute of limitations under Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). Review should be granted to restore the vitality of Section 10(b).

ARGUMENT

1. The "closely-related" doctrine does not moot the Petition or address the errors of law below. The question is not whether the closely-related doctrine applies –

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[1] For the sake of consistency with the Union's Brief in Opposition, Petitioners cite the Joint Appendix used before the Sixth Circuit as "APX," and designate General Counsel exhibits in the proceedings below as "GCX."

Petitioners concede for purposes of this appeal that it does – but whether that doctrine justifies the decision reached below. It does not.

Even under the closely-related doctrine, "[a] complaint amendment that is otherwise closely related to a timely-filed charge must also be based upon conduct that occurred within six months of that charge." *Redd-I, Inc.*, 290 N.L.R.B. 1115, 1115 (1988) (emphasis added). In the instant case, the charge was filed on April 3, 1991, so the relevant window of conduct is from October 3, 1990 to April 3, 1991. *See* U. Br. at 12 ("October 3, 1990 was the statute bar date [sic] if the 'closely related' doctrine applies.")[2] The Board erroneously asserts that the rulings below appropriately limited the "closely related" analysis to Petitioners' bargaining conduct during this six-month period. *See* NLRB Br. at 13, n.6.

Bad faith bargaining by the Union between October 1990 and April 1991 would excuse bad faith on the part of Petitioners. *See Local 777, Democratic U. Organizing Comm. v. NLRB*, 603 F.2d 862, 911 (D.C. Cir. 1978) (union's bad-faith bargaining may "excuse[ ] the [employer's] obligation to bargain"); *Chicago Tribune Co.*, 304 N.L.R.B. 259, 260 (1991) (union's bad faith bargaining "may remove the possibility of negotiation and thus preclude the existence of a situation in which the [employer's] own good faith can be tested. If it cannot be tested, its absence can hardly be found.").

Neither the Board nor the Sixth Circuit conducted the comparative analysis that is required for the only six-month

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[2] The Board's brief in opposition to this Petition is cited as "NLRB Br." The Union's brief is cited as "U. Br."

period to which the "closely related" doctrine applies. The Board found that the Pact rendered Petitioners' bargaining "unlawful from its inception." App. 29a. As a result, it totally ignored the Union's bad-faith bargaining conduct which had resulted in multiple unfair labor practice charges found to have merit by the Regional Director. App. 108a-114a. The Board instead ruled that "[n]othing the Union did or failed to do makes any difference." App. 85a. Yet, if the "fraudulent concealment" from the Union ended in July 1991 – as found by the Administrative Law Judge ("ALJ")[3] – the Board may not simply rely on the January 1990 Pact, which is time barred, to cast a one-sided pall on the parties' negotiations. *Cf. Chemung Contracting Corp.*, 291 N.L.R.B. 772, 773 (1988) (continued failure to make contributions six months before charge did not revive time-barred repudiation of obligation to make contributions). Rather, the Board must assess both parties' bargaining conduct during the relevant period of October 1990 to April 1991. Remand for such an analysis is required.

2. The Board and the Union admit that the fraudulent concealment doctrine requires reasonable diligence on the part of the party seeking to toll the statute of

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[3] The ALJ acknowledged that Petitioners told the Union that the Pact existed in 1991 but ignored the Union's failure to act upon that knowledge. App. 55a. ("[F]or 16 months, until July 12, 1991 . . . [Petitioners] concealed the existence of the pact.") Long's July 1992 letter to the Office of Appeals, cited by the Board and the Union in their briefs (NLRB Br. at 16; U. Br. at 28-29), adds nothing to the analysis. The ALJ determined that this letter amounted only to the denial of the commission of an unfair labor practice, which does not extend the statute of limitations. App. 56a; *see also Brown & Sharpe Mfg. Co.*, 321 NLRB 924 (1996) (*Brown & Sharpe III*), *aff'd, International Ass'n of Machinists and Aerospace Workers District Lodge 64 v. NLRB*, 130 F.3d 1083 (D.C. Cir. 1997), *cert. denied*, ____ U.S. ____, 118 S. Ct. 2319 (1998).

limitations. NLRB Br. at 14; U. Br. at 23-24. The Board argues that because the Sixth Circuit has recognized the diligence requirement in other contexts, it applied that standard below. The argument is directly contrary to the decision itself, which applied a two-part test that abolishes the need for diligence, and which did not cite any of the cases relied upon by the Board before this Court. App. 21a ("Fraudulent concealment of a material fact underlying an unfair labor practice charge tolls the six-month limitations period.") The Sixth Circuit's standard enunciated below is contrary to the law in other circuits. *See* Petitioners' Opening Brief at 14-15. It also fails to place on the Union the burden of explaining its lack of diligence once it confirmed that Petitioners were bound by an "agreement with respect to bargaining." App. 178a (APX 643; GCX 143).[4]

In all but the Sixth Circuit, the law is clear that once a party is on "inquiry notice" of a potential unfair labor practice, it must act within six months or lose its right to complain. *See Truck Drivers & Helpers Local 179 v. NLRB (Girardi Distributors)*, 993 F.2d 990, 995 (1st Cir. 1993) ("*Irrespective of the extent of the effort to conceal*, the

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[4] The Board argues, without evidence, that the Union believed it would be futile to ask the General Counsel to subpoena the Pact in support of its pending charge because one Petitioner had failed previously to produce the Pact in response to the Union's earlier administrative subpoena and Long claimed the Pact was covered by the attorney-client privilege. NLRB Br. at 17, n.10. The argument is without proof or merit. The March 1, 1990 administrative subpoena was issued in an entirely different proceeding and did not involve, and was not served on, all Petitioners. It also pre-dated Petitioners' acknowledgement that the Pact existed. The Petitioners as a group produced the Pact once the General Counsel did subpoena it. In short, the argument is irrelevant to the Union's failure to act in July 1991, once it was on, at least, inquiry notice of the Pact.

fraudulent concealment doctrine will not save a charging party who . . . is . . . charged with *notice* of a potential claim.") (emphasis added); *Gardner v. Intern'l Telegraph Employees Local No. 9*, 850 F.2d 518, 523 (9th Cir. 1988) (per curiam) (same); *John Morrell & Co.*, 403 N.L.R.B. 896, 900 (1991), *aff'd, United Food & Commercial Workers Union v. NLRB*, 998 F.2d 7 (D.C. Cir. 1993) (Section 10(b) runs when a party suspects or should have suspected an unlawful scheme).

The Board and the Union argue that the Sixth Circuit did *in fact* evaluate the Union's diligence but merely rejected Petitioners' arguments. NLRB Br. at 14-15; U. Br. at 18. In support, however, they can cite only to the appellate court's statement that Petitioners' diligence argument "borders on the disingenuous" because Petitioners "flagrantly misrepresented the Pact's terms." *Id.* The misrepresentations cited by the court, however, date back to early 1990; they are simply non-responsive to the question of whether the Union exercised due diligence when it confirmed the existence of an "agreement with respect to bargaining between and among the distributors" on July 12, 1991.

By focusing on Petitioners' failure to disclose the terms of the Pact, the Sixth Circuit held that once there has been fraudulent concealment, an injured party will never be found to be on inquiry notice and can safely sit on its hands regardless of its later knowledge. Here, the Union observed the Petitioners' bargaining conduct until, in June 1991, "it was very clear to [the Union] that [Petitioners] could not make the decision for themselves. They were . . . marching in lock step. . . . So [the Union] figured [Petitioners] had to have some sort of document that bound them together." App. 121a-122a. Then, after denying for months that any Pact existed, the Petitioners explicitly told the Union on

July 12, 1991 that there was an "agreement with respect to bargaining between and among the distributors." App. 178a (APX 643; GCX 143). The Union failed to notify the General Counsel of the Pact or to seek an investigative subpoena in support of its pending charge. *See* NLRB Casehandling Manual, Section 11770 (Investigative Subpoenas) (App. 180a-181a).[5]

The Sixth Circuit thus absolved the Union of any obligation to act promptly, finding that the Union's knowledge of the *existence* of the Pact was irrelevant to the concealment analysis. App. 22a. In this, the circuit court went beyond the Board's own finding – in contradiction to the discussion in the recommended decision of the ALJ – that it was the concealment of the *existence* of the Pact, and not its terms, that constituted the fraud. *See* App. 30a ("Respondents' fraudulent concealment of the existence of the pact tolled the 10(b) period."). Clearly and admittedly, Petitioners did not – and could not – conceal the existence of the Pact after July 12, 1991; and clearly and admittedly, the Union did nothing once it confirmed its suspicions about the Pact's existence. The standard is not, as the Sixth Circuit would have it, that an initial fraudulent concealment tolls the statute of limitations without regard to later evidence known to the charging party.

The failure of the court below to maintain the same diligence standard that applies in other circuits significantly damages the statute of limitations in the NLRA. Congress intentionally set a very short limitations period to force unions, employers and the Board to deal in a timely way with alleged wrongs or forego their rights to do so, in the

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[5] Petitioners had no obligation to give the Union a copy of the Pact in bargaining. *See* App. 55a.

overarching interest of the statutory goals. The decision below abrogates that congressional policy and materially alters the statute of limitations.

CONCLUSION

The Petition for a Writ of *Certiorari* should be granted so that the judgment of the Sixth Circuit may be reversed and the case remanded for an analysis which evaluates both parties' bargaining conduct between October 1990 and April 1991.

Respectfully submitted,

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APPENDIX

LOCAL UNION No. 1038
affiliated with the
**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA**
2741 Trumbull Avenue / Detroit, Michigan 48216 / Phone 964-0720

July 16, 1991

W.C. Thomas
West Coast Industrial Relations Association
170 Knowles Drive, Suite 210
Los Gatos, California 95030

Regarding: Information

Dear Mr. Thomas:

At the July 12 meeting with Powers, Steve Wolock requested any documents which reflect a mutual assistance pact and/or agreement with respect to bargaining between and among the distributors. You said there was such a document, and that you would think about providing us with a copy of it.

By this letter we reiterate our request for that document and like documents. We believe this information is relevant to the Union's performance of its bargaining duty. It is relevant and necessary to the intelligent formulation of demands. It will be helpful to have this information in order to know whether some of the concessions we would like to

offer to some Companies, but not others, can reasonably be expected to lead to an agreement with the Companies in question. We request that you provide us this information within ten days of receipt of this letter.

This letter shall also serve to confirm our meeting on August 21, 1991, with Hubert.

Finally, just so there is no confusion on this issue, we are more than willing to meet and talk with each of the Companies about all topics of bargaining, including wages, management rights, casuals and probationary employees. On the particular topics of wages, management rights, casuals and probationary employees, our firm demand, however, is that you restore the status quo in order to eliminate the unfair disadvantage you have put us at by your illegal acts. This is our bargaining demand. We are not demanding that you remedy your unfair labor practices. We are demanding as a matter of bargaining that you restore the status quo on wages, management rights, casuals and probationary employees. Moreover, we are certainly willing to bargain with each of the Companies about such issues as load limits, curfews, starting times, etc. Although as we have repeatedly told you, we do believe that your illegal actions have made meaningful and fair bargaining very difficult.

Very truly yours,

Robert E. Knox
President

NATIONAL LABOR RELATIONS BOARD
CASEHANDLING MANUAL
UNFAIR LABOR PRACTICE PROCEEDINGS

11770 *Investigative Subpoenas*: During certain investigations, in both R and C cases, resort to subpoenas will be necessary in order to ascertain the facts on which to base an administrative decision on the merits.

(Since the object of investigative subpoenas is the ascertainment of facts on which administrative decisions may be based, they should not be used *after* a regional decision to issue complaint unless Division of Operations Management clearance has been procured.)

There is no comparable right to an investigative subpoena available to parties other than General Counsel.

11770.1 *Application for Investigative Subpoena*: The investigative subpoena should be requested of the Regional Director by the attorney assigned to the case. (If no attorney assignment has been made up to this point, it should now be made.) The application, in writing, should contain a statement of the scope of the information or documents sought and of their relevance.

11770.2 *Issuance by Regional Director*: The Regional Director, *where there are no foreseeable problems of enforceability*, has authority to issue an investigative subpoena without clearance by the Division of Operations Management:

a. Where a potential witness or custodian of needed records is willing to testify or to produce the records only if subpoenaed;

b. Where the object of the desired subpoena is the ascertainment of "commerce" data; the

party to be called is a party to the case or the records required are those of a party to the case; *and* there is reasonable cause to believe that the Board would assert jurisdiction;

c. Where the object of the desired subpoena is the procurement of an eligibility list for an impending election; or

d. Where the object of the desired subpoena is the procurement of a payroll list of unit employees to determine the majority status of a union in a C case (sec. 10058.4).

Clearance by the Division of Operations Management should be sought in all other situations. Requests for clearance should contain a copy of the memorandum accompanying the application, any other information deemed relevant, and the Region's recommendations.

Investigative subpoenas, when issued, should be returnable at a time certain before the Regional Director, where this is at all practicable.